TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 161.

GERTRUDE H. HARDIN, PLAINTIFF IN ERROR,

vs.

CONRAD S. JORDAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 8, 1900.

Parker said "two or three hundred yards" (fol. 19).
Ackerly said "about 300 yards" (fol. 30).
James E. Purnell says "about 300 feet" (fol. 32).
And James S. Purnell says "about 350 feet" (fol. 33).

EIGHTH POINT.

I have not thought it necessary to take time to discuss the opinion of the District Judge in this case. The facts, as he found them to be, were so different from the facts as found by the Circuit Judge, that there is little in it which bears on the questions of law in the case here.

One consideration may well be adverted to, viz., that the decisions of the District Court in Pennsylvania, and of the Circuit Court of the Third Circuit are in accord with the decision of the Circuit Court in this case.

NINTH POINT.

The decree of the Circuit Court should be affirmed with costs.

ROBERT D. BENEDICT,
Proctor and Advocate for Libellant.

140-371
140-371

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 161.

GERTRUDE H. HARDIN, PLAINTIFF IN ERROR,

vs.

CONRAD N. JORDAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 8, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 161.

GERTRUDE H. HARDIN, PLAINTIFF IN ERROR,

vs.

CONRAD N. JORDAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Walter Q. Gresham, judge of the United States circuit court for the seventh circuit, on Monday, the eighteenth day of January, 1886, in the December term of said court, in the year of our Lord one thousand eight hundred and eighty-five, and of our Independence the one hundred and tenth year.

WM. H. BRADLEY, *Clerk.*

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } 18197. Ejectment.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the fourth day of December, 1882, there was filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, a bond for costs and a transcript of record from the superior court of Cook county, Illinois, in said above-entitled cause; which said bond and transcript are respectively in the words and figures following, to wit:

2 UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

Circuit Court. December Term, A. D. 1882.

G. H. HARDIN
vs.
C. N. JORDAN. } In Ejectment.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court; and, in default of payment by the def't of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this fourth day of December, A. D. 1882.

JOHN I. BENNETT.

Endorsed: Filed Dec. 4th, A. D. 1882. Wm. H. Bradley, clerk.

3 *Transcript.*

UNITED STATES OF AMERICA,
State of Illinois, County of Cook, } ss:

Pleas before the Honorable Sidney Smith, one of the judges of the superior court of Cook county, in the State of Illinois, holding a branch court of said court, at a regular term of said superior court of Cook county, begun and holden at the court-house, in the city of Chicago, in said county and State, on the first Monday, being the sixth day, of November, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States of America the one hundred and seventh.

Present: The Honorable Sidney Smith, judge of the superior court of Cook county; Luther Laflin Mills, State's attorney; Orrin L. Mann, sheriff of Cook county.

Attest: JOHN J. HEALY, *Clerk.*

Be it remembered that heretofore, to wit, on the second day of October, in the year of our Lord one thousand eight hundred and eighty-two, there was filed in the office of the clerk of the superior court of Cook county a certain declaration, which is in words and figures following, to wit:

4 STATE OF ILLINOIS,
Cook County, } ss:

Superior Court of Cook County. November Term, 1882.

GERTRUDE H. HARDIN
vs.
JOSEPH P. ORD and JABEZ A. SMALE. } Ejectment.

Gertrude H. Hardin, by Barton & Chamberlain, her attorneys, complains of Joseph P. Ord and Jabez A. Smale of a plea of ejectment, for that the plaintiff, on the first day of September, in the year 1882, was possessed of a certain parcel of land, with the appurtenances, lying in the county aforesaid, to wit, the southeast fractional quarter of section nineteen (19), the northeast fractional quarter of section thirty (30), and the east fraction of the southeast quarter of section thirty (30), all in township thirty-seven (37) north, range fifteen (15) east, of the third principal meridian; which said tenements the plaintiff claims in fee.

And, the plaintiff being so thereof possessed, the defendants afterwards, to wit, on, etc., entered into such part of said tenements which lies east of the north and south section line between sections seventeen (17) and eighteen (18), in said township extended south, and north of the east and west section line between sections numbers nineteen (19) and thirty (30) extended east, and west of the north and south half-section line running through sections seventeen (17)

and twenty (20), in said township extended south, and south
5 of the east and west half-section line running through said sections nineteen (19) and twenty (20) extended, and now unlawfully withhold from the plaintiff the possession thereof, to the damage of the plaintiff of ten thousand dollars, and therefore she brings her suit, &c.

BARTON & CHAMBERLAIN,
Plaintiff's Attorneys.

And on the day and year last aforesaid, to wit, October 2nd, 1882, there issued out of the office of the clerk of said court the people's writ of summons; which writ, with the return of the sheriff thereon indorsed, is in words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

The people of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon Joseph P. Ord & Jazeb A. Smale, if they shall be found in your county, personally to be and appear before the superior court of Cook county on the first day of the term thereof, to be holden at the court-house, in the city of Chicago, in said Cook county, on the first Monday of November next, to answer unto Gertrude H. Hardin in a plea of ejectment to the damage of said plaintiff, as it is said, in the sum of ten thousand dollars; and have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness John J. Healy, clerk of our said court, and the seal thereof, at Chicago aforesaid, this 2nd day of October, A. D. 1882.

[SEAL.] JOHN J. HEALY, *Clerk.*

6 Pd. Served this writ on the within-named defendant, Joseph P. Ord, by reading the same to him this 24th day of October, 1882. The other defendant not served, by order of pl'ff's att'y.

O. L. MANN, *Sheriff,*
By ELIAS SHIPMAN, *Deputy.*

And afterwards, to wit, on the 13th day of November, in the year last aforesaid, to wit, A. D. 1882, there were filed in the office of the clerk of said court a certain stipulation, two appearances, motion, petition, and bond, which are in words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

Superior Court of Cook County. November Term, 1882.

GERTRUDE H. HARDIN
vs.
JOSEPH P. ORD and J. G. SMALE. } 84147, 7990. Ejectment.

GERTRUDE H. HARDIN
vs.
JOSEPH P. ORD and THOMAS CASH. } 84148, 7991. Ejectment.

GERTRUDE H. HARDIN
vs.
JOSEPH P. ORD and BENJAMIN FOGLI. } 84149, 7992. Ejectment.

7 GERTRUDE H. HARDIN
vs.
JOSEPH P. ORD and KILLAM SMITH. } 84150, 7993. Ejectment.

Whereas the said defendants other than said Joseph P. Ord in said several cases were the tenants of said Ord and held under him; and whereas the said Ord made conveyance of the several tracts involved in said suits prior to service on him to Conrad N. Jordan, of New York city, who, by virtue of said conveyance and assignment of leases, is the landlord of said defendants other than said Ord; now, it is agreed that on the first day of the next November term of said court or within ten days thereafter the appearance in writing of said Ord and said Jordan shall be entered in each of said suits, as well as the appearance in writing of each of said other defendants in the suits to which they are respectively made parties, for the sole purpose of substitution, as herein provided; which said appearance shall be signed by the parties themselves and shall authorize and accept the substitution hereinafter mentioned; whereupon an order of court shall be entered in each of said causes substituting the name of Conrad N. Jordan as sole defendant in each and every of said causes in place of said Ord and said several other defendants, but such order and such substitution shall not cut off the plaintiff from any right she has acquired against the several interests in said land, if any, held by said defendants by reason of having instituted said suits, and no judgment for costs or damages or other personal judgment shall be taken against said Ord unless it shall appear on the trial hereof that he then retains or holds some interest in said
8 lands adverse to plaintiff, and in that case the said Ord shall be made party defendant in said causes and his appearance entered therein *instanter*.

GERTRUDE H. HARDIN, *Plaintiff,*
By JESSIE B. BARTON, *Her Attorney.*
J. P. ORD.
J. T. & F. I. BENNETT,
Att's for C. N. Jordan.

Superior Court. Nov. Term, 1882.

STATE OF ILLINOIS, } ss:
Cook County, }

GERTRUDE H. HARDIN }
vs. } Ejectment.
JOSEPH P. ORD and J. G. SMALE. }

I do hereby enter my appearance in the above-entitled cause and waive service of process therein, provided I am substituted as sole defendant in said cause in place of Joseph P. Ord and J. G. Smale. J. I. & F. I. Bennett are authorized to appear as my attorneys for the purpose of said substitution and other purposes.

CONRAD N. JORDAN.

Superior Court. Nov. Term, 1882.

STATE OF ILLINOIS, } ss:
Cook County, }

GERTRUDE H. HARDIN }
vs. } Ejectment.
9 JOSEPH P. ORD and J. G. SMALE. }

We do hereby enter our appearance in the above-entitled cause for the sole purpose of having Conrad N. Jordan, of New York city (who is the landlord of said J. G. Smale and the grantee prior to service herein of said Ord), substituted for us and both of us as sole defendant in the above cause, hereby consenting and insisting upon said substitution. J. I. & F. I. Bennett are authorized to appear for us and see that said substitution is made.

J. P. ORD.
J. G. SMALE.

Motion to Substitute.

STATE OF ILLINOIS, } ss:
Cook County, }

Superior Court. Nov. Term, 1882.

GERTRUDE H. HARDIN }
vs. } Ejectment.
JOSEPH P. ORD and J. G. SMALE. }

And now come Conrad N. Jordan, Joseph P. Ord, and J. G. Smale, by J. I. & F. I. Bennett, for the purpose of this motion only, and move the court to substitute said Conrad N. Jordan as sole defendant in the above-entitled suit in the place of said defendants, Ord and Smale, in accordance with the stipulation filed, the said Ord having conveyed to said Jordan prior to service and the said Smale being the tenant of said Jordan and declining to defend.

J. I. & F. I. BENNETT,
10 *Attorneys for Jordan, Ord, and Smale.*

Petition and Bond.

In the Superior Court of Cook County, State of Illinois. Nov. Term, A. D. 1882.

GERTRUDE H. HARDIN, Plaintiff, *vs.* CONRAD N. JORDAN, Defendant. } Petition for Removal to the Circuit Court of the United States, Northern District of Illinois.

To said superior court:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of different States, and that the petitioner, who is the sole defendant, was at the time of the commencement of this suit and at the time he became such sole defendant and still is a citizen of the State of New York, and that Gertrude H. Hardin, who is the sole plaintiff, was then and still is a citizen of the State of Illinois.

And your petitioner offers herewith a bond, with good and sufficient surety, for his entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And he prays this honorable court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into said circuit court of the United States in and for the northern district of Illinois; and he will ever pray.

CONRAD N. JORDAN, *Petitioner.*

J. I. & F. I. BENNETT,
Att'ys for Petitioner.

STATE OF ILLINOIS, *Cook County,* } ss.:

I, Frank I. Bennett, being duly sworn, do say that I am a member of the firm of J. I. & F. I. Bennett, the attorneys for the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

FRANK I. BENNETT.

Subscribed and sworn to before me this 13th day of November, A. D. 1882.

JNO. J. HEALY, *Clerk.*

Know all men by these presents that I, Conrad N. Jordan, as principal, and John I. Bennett and Frank I. Bennett, as sureties, are held and firmly bound unto Gertrude H. Hardin in the penal sum

of five hundred dollars; the payment whereof, well and truly to be made unto said Gertrude H. Hardin, her heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents—

Yet upon these conditions, that the said Conrad N. Jordan having petitioned the superior court of Cook county, State of Illinois, for the removal of a certain cause therein pending, wherein Gertrude H. Hardin is plaintiff and Conrad N. Jordan is defendant, to the circuit court of the United States in and for the northern district of Illinois:

12 Now, if the said Conrad N. Jordan, your petitioner, shall enter into said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully and improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 13th day of November, A. D. 1882.

CONRAD N. JORDAN.
JOHN I. BENNETT.
FRANK I. BENNETT.

STATE OF ILLINOIS, } ss:
Cook County, }

We, John I. Bennett and Frank I. Bennett, of said county, the sureties named in the foregoing bond, being severally duly sworn, do depose and say that we are both residents of the State of Illinois, and property-holders therein; that we are each worth separately the sum of five hundred dollars over and above all our several debts and liabilities and exclusive of property by law exempt from execution; that we both have property in the State of Illinois liable to execution of the value of more than five hundred dollars.

We further state that we severally executed the bond hereto annexed as surety; that we know the handwriting of Conrad N. Jordan, who executed the same as principal, and that his signature thereto is genuine.

JOHN I. BENNETT.
FRANK I. BENNETT.

13 Subscribed and sworn to before me this 13th day of November, A. D. 1882.

JNO. J. HEALY, *Clerk.*

And on the day and year last aforesaid, to wit, November 13th, A. D. 1882, the same being one of the days of the November term of said court, the following, among other, proceedings were had in said court and entered of record, to wit:

GERTRUDE H. HARDIN
vs.
JOSEPH P. ORD *et al.* } 84147. Ejectment.

On the stipulation of the parties to this suit, this day filed, it is ordered that Conrad N. Jordan be, and is hereby, substituted as sole defendant herein.

And afterwards, to wit, on the 18th day of November, in the year last aforesaid, to wit, A. D. 1882, there was filed in the office of the clerk of said court a certain notice, which is in words and figures following, to wit:

STATE OF ILLINOIS, }
County of Cook, } *ss*:

In the Superior Court of Cook County. November Term, A. D. 1882.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment. Cases No-. 7990 & 7992.

14 To Messrs. Barton & Chamberlain, attorneys for said plaintiff:

You are hereby notified that on Saturday, the 18th day of November, A. D. 1882, at 10 a. m. or as soon thereafter as counsel can be heard, we shall, before his honor Judge Smith, in the room usually occupied by him as a court-room, in said county, move the court for orders in said several cases staying further proceedings therein and for the certifying of said several cases to the United States circuit court for the northern district of Illinois that there was filed in each of said causes on the 13th inst. a proper bond, petition, and other papers for the removal thereof, at which time and place you can appear, if you see fit.

J. I. & F. I. BENNETT,
Attorneys for Defendant.

Dated Nov. 17, 1882.

We hereby accept service of the above notice.

BARTON & CHAMBERLAIN,
Attorneys for Plaintiff.

And on the day and year last aforesaid, to wit, November 18th, A. D. 1882, the same being one of the days of the November term of said court, the following, among other, proceedings were had in said court and entered of record, to wit:

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } 84147. Ejectment.

On motion of defendant's attorney on filing petition and bond,

it is ordered that said cause be, and is hereby, transferred
15 to the United States circuit court in and for the northern district of Illinois, and the clerk of this court do forthwith transmit to said United States circuit court a full and complete transcript of all papers and pleadings filed in said cause, together with all orders made and entered of record herein.

STATE OF ILLINOIS, } ss:
County of Cook, }

I, John J. Healy, clerk of the superior court of Cook county in and for the State of Illinois, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record in a certain cause lately pending in said court on the common-law side thereof, wherein Gertrude H. Hardin was plaintiff and Conrad N. Jordan defendant.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at Chicago, this 27th day of November, A. D. 1882.

JNO. J. HEALY, *Clerk.*

(Endorsed:) Filed Dec. 4, 1882. Wm. H. Bradley, clerk.

Afterwards, to wit, on the fifth day of December, 1882, came the defendant, by his attorney, and filed in said clerk's office his plea in said entitled cause; which said plea is in the words and figures following, to wit:

16 In the Circuit Court of the United States, Northern District of Illinois. December Term, 1882.

CONRAD N. JORDAN }
ats. } Ejectment.
GERTRUDE H. HARDIN. }

And the defendant, by John I. Bennett, his attorney, comes and defends the wrong and injury when, &c., and says that he is not guilty of unlawfully withholding the tenements in the said declaration mentioned or any part thereof in manner and form as the plaintiff has above thereof complained against him, and of this the defendant puts himself upon the country, &c.

JOHN I. BENNETT,
Attorney for Defendant.

Endorsed: Filed Dec. 5th, 1882. Wm. H. Bradley, clerk.

17 GERTRUDE H. HARDIN }
vs. } 18198.
CONRAD N. JORDAN. }

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the fourth day of December, 1882, there was filed in the office of the clerk of the circuit court of the

United States for the northern district of Illinois, at Chicago, in said district, a bond for costs and a transcript of record from the superior court of Cook county, Illinois, in said above-entitled cause; which said bond and transcript are, respectively, in the words and figures following, to wit:

18 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

Circuit Court. Dec. Term, A. D. 1882.

G. H. HARDIN }
vs. } In Ejectment.
C. N. JORDON. }

I enter myself security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the def't of any costs ordered or adjudged to be paid by him I hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this 4th day of December, A. D. 1882.

JOHN I. BENNETT.

Endorsed: Filed Dec. 4th, 1882. Wm. H. Bradley, clerk.

19 UNITED STATES OF AMERICA, } ss:
State of Illinois, County of Cook, }

Pleas before the Honorable Sidney Smith, one of the judges of the superior court of Cook county, in the State of Illinois, holding a branch court of said court, at a regular term of said superior court of Cook county, begun and holden at the court-house, in the city of Chicago, in said county, and State, on the first Monday, being the sixth day, of November, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States of America the one hundred and seventh.

Present: The Honorable Sidney Smith, judge of the superior court of Cook county; Luther Laflin Mills, State's attorney; Orrin L. Mann, sheriff of Cook county.

Attest: JOHN J. HEALY, *Clerk.*

Be it remembered that heretofore, to wit, on the second day of October, in the year of our Lord one thousand eight hundred and eighty-two, there was filed in the office of the clerk of the superior court of Cook county a certain declaration, which is in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

20 Superior Court of Cook County. November Term, 1882.

GERTRUDE H. HARDIN
vs.
JOSEPH P. ORD and BENJAMIN FOGLI. } Ejectment.

Gertrude H. Hardin, by Barton & Chamberlain, her attorneys, complains of Joseph P. Ord and Benjamin Fogli of a plea of ejectment, for that whereas the plaintiff, on the first day of September, in the year 1882, was possessed of a certain parcel of land, with the appurtenances, lying in the county aforesaid, to wit, the southeast fractional quarter of section nineteen (19), the northeast fractional quarter of section thirty (30), and the east fraction of the southeast quarter of section thirty (30), all in township thirty-seven (37) north, range fifteen (15) east, of the third principal meridian, which said tenements the plaintiff claims in fee.

And, the plaintiff being so thereof possessed, the defendants afterwards, to wit, on, etc., entered into such part of said tenements which lies eighty (80) rods on each side of the east and west half-section line running through said section thirty (30) extended east, and between the north and south section line between sections seventeen (17) and eighteen (18), in said township, extended south, and the north and south half-section line running through sections seventeen (17) and twenty (20), in said township, extended south, and now unlawfully withholds from the plaintiff the possession thereof, to the damage of the plaintiff of ten thousand dollars, and therefore she brings her suit, &c.

21

BARTON & CHAMBERLAIN,
Plaintiff's Attorneys.

And on the day and year last aforesaid, to wit, October 2nd, A. D. 1882, there issued out of the office of the clerk of said court the people's writ of summons; which writ, with the return of the sheriff thereon endorsed, is in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

The people of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon Joseph P. Ord and Benjamin Fogli, if they shall be found in your county, personally to be and appear before the superior court of Cook county, on the first day of the term thereof, to be holden at the court-house, in the city of Chicago, in said Cook county, on the first Monday of November next, to answer unto Gertrude H. Hardin in a plea of ejectment, to the damage of said plaintiff, as it is said, in the sum of ten thousand dollars.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness John J. Healy, clerk of our said court, and the [SEAL.] seal thereof, at Chicago aforesaid, this 2nd day of October, A. D. 1882.

JNO. J. HEALY, *Clerk.*

P'd 75c.

Served this writ on the within-named defendant, Joseph P. Ord, by reading the same to him this 24th day of October, 1882, the other defendant not served by order of pl'ff's att'y.

22 O. L. MANN, *Sheriff*,
By ELIAS SHIPMAN, *Deputy.*

And afterwards, to wit, on the 13th day of November, in the year last aforesaid, to wit, A. D. 1882, there were filed in the office of the clerk of said court a certain motion, two appearances, petition, and bond, which are in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

Superior Court. Nov. Term, 1882.

GERTRUDE H. HARDIN
vs.
JOSEPH P. ORD and BENJAMIN FOGLI. } 84149. 7992. Ejectment.

And now come Conrad N. Jordan, Joseph P. Ord, and Benjamin Fogli, by J. I. & F. I. Bennett, for the purpose of this motion only, and move the court to substitute said Conrad N. Jordan as sole defendant in the above-entitled suit in the place of said defendants Ord and Fogli, in accordance with the stipulation filed, the said Ord having conveyed to said Jordan prior to service, and the said Fogli being the tenant of said Jordan and declining to defend.

J. I. & F. I. BENNETT,
Attorneys for Jordan, Ord, and Fogli.

STATE OF ILLINOIS, } ss:
Cook County, }

Superior Court. Nov. Term, 1882.

23 GERTRUDE H. HARDIN
vs.
JOSEPH P. ORD and BENJAMIN FOGLI. } 84149. 7992. Ejectment.

We do hereby enter our appearance in the above-entitled cause for the sole purpose of having Conrad N. Jordan, of New York city (who is the landlord of said Benjamin Fogli and the grantee prior to service herein of said Ord), substituted for us and both of us as sole defendant in the above cause, hereby consenting to and insisting upon said substitution. J. I. & F. I. Bennett are authorized to appear for us and see that said substitution is made.

J. P. ORD.
B. FOGLI.

STATE OF ILLINOIS, } ss :
Cook County, }

Superior Court. Nov. Term, 1882.

GERTRUDE H. HARDIN
vs.
JOSEPH P. ORD and BENJAMIN FOGLI. } 84149. 7992. Ejectment.

I do hereby enter my appearance in the above-entitled cause and waive service of process therein, provided that I am substituted as the sole defendant in said cause in place of Joseph P. Ord and Benjamin Fogli. J. I. & F. I. Bennett are authorized to appear as my attorneys for the purpose of said substitution and other purposes.

CONRAD N. JORDAN.

24 *Petition and Bond.*

In the Superior Court of Cook County, State of Illinois. Nov. Term, A. D. 1882.

GERTRUDE H. HARDIN, Plaintiff,
vs.
CONRAD N. JORDAN, Defendant.

Petition for removal to the circuit court of the United States, northern district of Illinois.

To said superior court:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of different States, and that the petitioner, who is the sole defendant, was at the time of the commencement of this suit and at the time he became such sole defendant and now is a citizen of the State of New York, and that Gertrude H. Hardin, who is sole plaintiff, was then and still is a citizen of the State of Illinois; and your petitioner offers herewith a bond, with good and sufficient surety, for his entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And he prays this honorable court to proceed no further herein, except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into said circuit court of the United States in and for
25 the northern district of Illinois; and he will ever pray.

CONRAD N. JORDAN, *Petitioner.*

J. I. & F. I. BENNETT,
Att'ys for Petitioner.

STATE OF ILLINOIS, } ss.:
Cook County, }

I, Frank I. Bennett, being duly sworn, do say that I am a member of the firm of J. I. & F. I. Bennett, the attorneys for the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

FRANK I. BENNETT.

Subscribed and sworn to before me this 13th day of November, A. D. 1882.

JNO. J. HEALY, *Clerk.*

Know all men by these presents that I, Conrad N. Jordan, as principal, and John I. Bennett and Frank I. Bennett, as sureties, are held and firmly bound unto Gertrude H. Hardin in the penal sum of five hundred dollars, the payment whereof, well and truly, to be made unto said Gertrude H. Hardin, her heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents, yet upon these conditions: that the said Conrad N. Jordan having petitioned the superior court of Cook county, State of Illinois, for the removal of a certain cause therein pending, wherein Gertrude H. Hardin is plaintiff and
26 Conrad N. Jordan is defendant, to the circuit court of the United States in and for the northern district of Illinois:

Now, if the said Conrad N. Jordan, your petitioner, shall enter into said circuit court of the United States on the first day of its next session a copy of the record in said suit and shall well and truly pay all costs that shall be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully and improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 13th day of November, A. D. 1882.

CONRAD N. JORDAN. [SEAL.]
JOHN I. BENNETT.
FRANK I. BENNETT.

STATE OF ILLINOIS, } ss.:
Cook County, }

We, John I. Bennett and Frank I. Bennett, of said county, the sureties named in the foregoing bond, being severally duly sworn, do depose and say that we are both residents of the State of Illinois and property-holders therein; that we are each separately worth the sum of five hundred dollars over and above all our several debts and liabilities and exclusive of property by law exempt from execution; that we both have property in the State of Illinois liable to execution of the value of more than five hundred dollars.

We further state that we severally executed the bond hereto annexed as surety; that we know the handwriting of Conrad N.

Jordan, who executed the same as principal, and that his signature thereto is genuine.

JOHN I. BENNETT.
FRANK I. BENNETT.

27 Subscribed and sworn to before me this 13th day of November, A. D. 1882.

JNO. J. HEALY, *Clerk.*

And on the day and year last aforesaid, to wit, November 13th, A. D. 1882, the same being one of the days of the November term of said court, the following, among other, proceedings were had in said court and entered of record, to wit:

GERTRUDE H. HARDIN
vs. } 84149. Ejectment.
JOSEPH P. ORD *et al.*

On the stipulation of the parties this day filed it is ordered that Conrad N. Jordan be, and is hereby, substituted as sole defendant.

And afterwards, to wit, on the 18th day of November, in the year last aforesaid, to wit, A. D. 1882, the same being one of the days of the November term of said court, the following, among other, proceedings were had in said court and entered of record, to wit:

GERTRUDE H. HARDIN
vs. } 84149. Ejectment.
CONRAD N. JORDAN.

On motion of defendant's attorney it is ordered that this cause be, and is hereby, transferred to the United States circuit court in and for the northern district of Illinois on defendant's filing
28 herein his petition and bond, and that the clerk of this court do forthwith transmit to said United States circuit court a full and complete transcript of all papers and pleadings filed in said cause, together with all orders made and entered of record herein.

STATE OF ILLINOIS, } *ss:*
County of Cook,

I, John J. Healy, clerk of the superior court of Cook county in and for the State of Illinois, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record in a certain cause lately pending in said court on the common-law side thereof, wherein Gertrude H. Hardin was plaintiff and Conrad N. Jordan defendant.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at Chicago, this 27th day of November, A. D. 1882.

JNO. J. HEALY, *Clerk.*

(Endorsed:) Filed Dec. 4, 1882. Wm. H. Bradley, clerk.

Afterwards, to wit, on the fifth day of December, 1882, came the defendant, by his attorney, and filed in said clerk's office his plea in said entitled cause; which said plea is in the words and figures following, to wit:

29 In the Circuit Court of the United States, Northern District of Illinois. December Term, 1882.

CONRAD N. JORDAN
ats.
GERTRUDE H. HARDIN. } Ejectment.

And the defendant, by John I. Bennett, his attorney, comes and defends the wrong and injury when, &c., and says that he is not guilty of unlawfully withholding the tenements in the said declaration mentioned or any part thereof in manner and form as the plaintiff has above thereof complained against him; and of this the defendant puts himself upon the country, &c.

JOHN I. BENNETT,
Attorney for Defendant.

Endorsed: Filed Dec. 5th, 1882. Wm. H. Bradley, clerk.

30 GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } 18199.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the fourth day of December, 1882, there was filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, a bond for costs and a transcript of record from the superior court of Cook county, Illinois, in said above-entitled cause; which said bond and transcript are respectively in the words and figures following, to wit:

31 UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

Circuit Court. Dec. Term, A. D. 1882.

G. H. HARDIN
vs.
C. N. JORDAN. } In Ejectment.

I enter myself security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the def't of any costs ordered or adjudged to be paid by him I hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this fourth day of December, A. D. 1882.

JOHN I. BENNETT.

Endorsed: Filed Dec. 4th, A. D. 1882. Wm. H. Bradley, clerk.

32 UNITED STATES OF AMERICA, } ss:
State of Illinois, County of Cook, }

Pleas before the Honorable Joseph E. Gary, one of the judges of the superior court of Cook county, in the State of Illinois, holding a branch court of said court, at a regular term of said superior court of Cook county begun and holden at the court-house, in the city of Chicago, in said county and State, on the first Monday, being the sixth day, of November, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States of America the one hundred and seventh.

Present: The Honorable Joseph E. Gary, judge of the superior court of Cook county; Luther Laflin Mills, State's attorney; Orrin L. Mann, sheriff of Cook county.

Attest: JOHN J. HEALY, *Clerk.*

33 Be it remembered that heretofore, to wit, on the second day of October, in the year of our Lord one thousand eight hundred and eighty-two, Gertrude H. Hardin, plaintiff, by Barton and Chamberlain, her attorneys, filed in the office of the clerk of said superior court of Cook county her certain declaration, which is in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

Superior Court of Cook County. November Term, 1882.

GERTRUDE H. HARDIN
vs.
JOSEPH P. ORD and THOMAS CASH. } Ejectment.

Gertrude H. Hardin, by Barton & Chamberlain, her attorneys, complains of Joseph P. Ord and Thomas Cash of a plea of ejectment, for that the plaintiff, on the first day of September, in the year 1882, was possessed of a certain parcel of land, with the appurtenances, lying in the county aforesaid, to wit, the southeast fractional quarter of section nineteen (19), the northeast fractional quarter of section thirty (30), and the east fraction of the southeast quarter of section thirty (30), all in township thirty-seven (37) north, range fifteen (15) east, of the third principal meridian, which said tenements the plaintiff claims in fee; and the plaintiff being so thereof possessed, the defendants afterwards, to wit, on its —,
34 entered into such part of said tenements which lies west of the north and south section line between sections seventeen (17) and eighteen (18), in said township extended south, and east of a line eighty (80) rods west of and parallel to said section line extended, and south of the east and west half section line running through said section thirty (30) extended east, and now unlawfully withhold from the plaintiff the possession thereof, to the damage of

the plaintiff of ten thousand dollars, and therefore she brings her suit.

BARTON & CHAMBERLAIN,
Plaintiff's Attorneys.

And on the day and year last aforesaid, to wit, October 2nd, A. D. 1882, there issued out of the office of the clerk of said court the people's writ of summons; which writ, with the return of the sheriff thereon endorsed, is in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

The people of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon Joseph P. Ord & Thomas Cash, if they shall be found in your county, personally to be and appear before the superior court of Cook county on the first day of the term thereof to be holden at the court-house, in the city
35 of Chicago, in said Cook county, on the first Monday of November next, to answer unto Gertrude H. Hardin in a plea of ejectment to the damage of said plaintiff, as it is said, in the sum of ten thousand dollars.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness John J. Healy, clerk of our said court, and the
[SEAL.] seal thereof, at Chicago aforesaid, this 2nd day of October, A. D. 1882.

JNO. J. HEALY, *Clerk.*

Marshal's Return.

Served this writ on the within-named defendant, Joseph P. Ord, by reading the same to him this 24th day of October, 1882; the other defendant not served by order of pl'ff's att'y.

O. L. MANN, *Sheriff,*
By ELIAS SHIPMAN, *Deputy.*

And afterwards, to wit, on the 13th day of November, in the year last aforesaid, to wit, A. D. 1882, there were filed in the office of the clerk of said court two certain appearances, a certain motion, petition, and bond, which are in words and figures following, to wit:

Appearances.

STATE OF ILLINOIS, } ss:
Cook County, }

Superior Court. Nov. Term, 1882.

36 GERTRUDE H. HARDIN
vs.
JOSEPH P. ORD and THOMAS CASH. } 84148, 7991. Ejectment.

We do hereby enter our appearance in the above-entitled cause

for the sole purpose of having Conrad N. Jordon, of New York city (who is the landlord of the said Thomas Cash and the grantee prior to service herein of said Ord), substituted for us and both of us as sole defendant in the above cause, hereby consenting to and insisting upon said substitution. J. I. &. F. I. Bennett are authorized to appear for us and see that said substitution is made.

J. P. ORD.
THOMAS CASH.

STATE OF ILLINOIS, } ss:
Cook County, }

Superior Court. Nov. Term, 1882.

GERTRUDE H. HARDIN
vs.
JOSEPH P. ORD and THOMAS CASH. } 84148, 7991. Ejectment.

I do hereby enter my appearance in the above-entitled cause and waive service of process therein, provided that I am substituted as the sole defendant in said cause in the place of Joseph P. Ord and Thomas Cash.

J. I. and F. I. Bennett are authorized to appear as my at-
37 torneys for the purposes of said substitution and other purposes.

CONRAD N. JORDAN.

Motion to Substitute.

STATE OF ILLINOIS, } ss:
Cook County, }

Superior Court. Nov. Term, 1882.

GERTRUDE H. HARDIN
vs.
JOSEPH P. ORD and THOMAS CASH. } Ejectment.

And now comes Conrad N. Jordan, Joseph P. Ord, and Thomas Cash, by J. I. & F. I. Bennett, for the purpose of this motion only, and move the court to substitute said Conrad N. Jordan as sole defendant in the above-entitled suit in the place of said defendants Ord and Cash, in accordance with stipulations filed, the said Ord having conveyed to said Jordan prior to service, and said Cash being the tenant of said Jordan and declining to defend.

J. I. & F. I. BENNETT,
Att'ys for Jordan, Ord, and Cash.

Petition.

In the Superior Court of Cook County, State of Illinois. Nov. Term, A. D. 1882.

GERTRUDE H. HARDIN, Plaintiff, *vs.* CONRAD N. JORDAN, Defendant. } Petition for Removal to the Circuit Court of the United States, Northern District of Illinois.

38 To said superior court:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of different States, and that the petitioner, who is the sole defendant, was at the time of the commencement of this suit and at the time he became such sole defendant and still is a citizen of the State of New York, and that Gertrude H. Hardin, who is sole plaintiff, was then and still is a citizen of the State of Illinois.

And your petitioner offers herewith a bond, with good and sufficient surety, for his entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit and for all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And prays this honorable court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into said circuit court of the United States in and for the northern district of Illinois; and he will ever pray.

CONRAD N. JORDAN, *Petitioner.*

J. I. & F. I. BENNETT,
Att'ys for Petitioner.

39 STATE OF ILLINOIS, *Cook County,* } ss:

I, Frank I. Bennett, being duly sworn, do say that I am a member of the firm of J. I. & F. I. Bennett, the attorneys for the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

FRANK I. BENNETT.

Subscribed and sworn to before me this 13th day of November, A. D. 1882.

JNO. J. HEALY, *Clerk.*

Bond.

Know all men by these presents that I, Conrad N. Jordan, as

principal, and John I. Bennett and Frank I. Bennett, as sureties, are held and firmly bound unto Gertrude H. Hardin in the penal sum of five hundred dollars; — the payment thereof, well and truly to be made, unto said Gertrude H. Hardin, her heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: that the said Conrad N. Jordan having petitioned the superior court of Cook county, State of Illinois, for the removal of a certain cause therein pending, wherein Gertrude H. Hardin is plaintiff and Conrad N. Jordan is defendant, to the circuit court of the United States in and for the northern district of Illinois:

40 Now, if the said Conrad N. Jordan, your petitioner, shall enter into said circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully and improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 13th day of November, A. D. 1882.

CONRAD N. JORDAN. [SEAL.]
JOHN I. BENNETT. [SEAL.]
FRANK I. BENNETT. [SEAL.]

STATE OF ILLINOIS, } ss:
Cook County, }

We, John I. Bennett and Frank I. Bennett, of said county, the sureties named in the foregoing bond, being severally duly sworn, do depose and say that we are both residents of the State of Illinois and property-holders therein; that we are each separately worth the sum of five hundred dollars over and above all our several debts and liabilities and exclusive of property by law exempt from execution; that we both have property in the State of Illinois liable to execution of the value of more than five hundred dollars.

We further state that we severally executed the bond hereto annexed as surety, that we know the handwriting of Conrad N.
41 Jordan, who executed the same as principal, and that his signature thereto is genuine.

JOHN I. BENNETT.
FRANK I. BENNETT.

Subscribed and sworn to before me this 13th day of November, A. D. 1882.

JNO. J. HEALY, *Clerk.*

And afterwards, to wit, on the 13th day of November, in the year last aforesaid, to wit, A. D. 1882, the same being one of the days of the November term of said court, the following, among other, proceedings were had in said court and entered of record, to wit:

GERTRUDE H. HARDIN
vs.
JOSEPH P. ORD *et al.* } 84148. Ejectment.

On the stipulation of the parties to this suit, this day filed, it is ordered that all papers and proceedings in this cause be, and are hereby, amended by substituting Conrad N. Jordan as sole defendant.

And afterwards, to wit, on the 18th day of November, in the year last aforesaid, to wit, A. D. 1882, the same being one of the days of the November term of said court, the following, among other, proceedings were had in said court and entered of record, to wit:

42 GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } 84148. Ejectment.

On motion of defendant's attorney, it is ordered that this cause be, and is hereby, transferred to the United States circuit court in and for the northern district of Illinois on filing petition and bond, and that the clerk of this court do forthwith transmit to said United States circuit court a full and complete transcript of all papers and pleadings filed in said cause, together with all orders made and entered of record herein.

STATE OF ILLINOIS, } ss:
County of Cook, }

I, John J. Healy, clerk of the superior court of Cook county in and for the State of Illinois, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record in a certain cause lately pending in said court, on the common-law side thereof, wherein Gertrude H. Hardin was plaintiff and Conrad N. Jordan defendant.

In witness whereof I have hereunto set my hand and [SEAL.] affixed the seal of said court, at Chicago, this 27th day of November, A. D. 1882.

JNO. J. HEALY, *Clerk.*

(Endorsed:) Filed Dec. 4, 1882. W. H. Bradley, clerk.

43 Afterwards, to wit, on the fifth day of December, 1882, came the defendant, by his attorney, and filed in said clerk's office his plea in said entitled cause; which said plea is in the words and figures following, to wit:

44 In the Circuit Court of the United States, Northern District of Illinois. December Term, 1882.

CONRAD N. JORDAN
ats.
GERTRUDE H. HARDIN. } Ejectment.

And the defendant, by John I. Bennett, his attorney, comes and

defends the wrong and injury when, &c., and says that he is not guilty of unlawfully withholding the tenements in the said declaration mentioned or any part thereof in manner and form as the plaintiff has above thereof complained against him; and of this the defendant puts himself upon the country, &c.

JOHN I. BENNETT,
Attorney for Defendant.

Endorsed: Filed Dec. 5th, 1882. Wm. H. Bradley, clerk.

45 GERTRUDE H. HARDIN
vs.
CONRAD N. JORDON. } 18200.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the fourth day of December, 1882, there was filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, a bond for costs and a transcript of record from the superior court of Cook county, Illinois, in said above-entitled cause; which said bond and transcript are respectively in the words and figures following, to wit:

46 UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

Circuit Court. Dec. Term, A. D. 1882.

G. H. HARDIN
vs.
C. N. JORDON. } In Ejectment.

I enter myself security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court; and, in default of payment by the def't of any costs ordered or adjudged to be paid by him, hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this 4th day of December, A. D. 1882.

JOHN I. BENNETT.

Endorsed: Filed Dec. 4th, 1882. Wm. H. Bradley, clerk.

47 UNITED STATES OF AMERICA,
State of Illinois, County of Cook, } *ss:*

Pleas before the Honorable Joseph E. Gary, one of the judges of the superior court of Cook county, in the State of Illinois, holding a branch court of said court, at a regular term of said superior court of Cook county, begun and holden at the court-house, in the city of Chicago, in said county and State, on the first Monday, being the sixth day, of November, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States of America the one hundred and seventh.

Present: The Honorable Joseph E. Gary, judge of the superior court of Cook county; Luther Laflin Mills, State's attorney; Orrin L. Mann, sheriff of Cook county.

Attest: JOHN J. HEALY, *Clerk.*

48 Be it remembered that heretofore, to wit, on the second day of October, in the year of our Lord one thousand eight hundred and eighty-two, there was filed in the office of the clerk of the superior court of Cook county a certain declaration, which is in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

Superior Court of Cook County. November Term, A. D. 1882.

GERTRUDE H. HARDIN
vs.
JOSEPH P. ORD and KILLAM SMITH. } Ejectment.

Gertrude H. Hardin, by Barton & Chamberlain, her attorneys, complains of Joseph P. Ord and Killam Smith of a plea of ejectment, for that the plaintiff on the first day of September, in the year 1882, was possessed of a certain parcel of land, with the appurtenances, lying in the county aforesaid, to wit, the southeast fractional quarter of section nineteen (19), the northeast fractional quarter of section thirty (30), and the east fraction of the southeast quarter of section thirty (30), all in township thirty-seven (37) north, range fifteen (15) east, of the third principal meridian, which said tenements the plaintiff claims in fee, and, the plaintiff being so pos-
49 sessed, the defendants afterwards, to wit, on, etc., entered into such part of said tenements which lies north of the east and west half-section line running through said section thirty (30) extended east, and west of the north and south section line running through section seventeen (17) and eighteen (18), in said township, extended south, and south of the east and west section line running between said sections nineteen (19) and thirty (30) extended east, and now unlawfully withhold from the plaintiff the possession thereof, to the damage of the plaintiff of ten thousand dollars, and therefore she brings her suit.

BARTON & CHAMBERLAIN,
Plaintiff's Attorneys.

And on the day and year last aforesaid there issued out of the office of the clerk of said court the people's writ of summons: which writ, with the return of the sheriff thereon endorsed, is in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

The people of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon Joseph P. Ord and Killam

Smith, if they shall be found in your county, personally to be and to appear before the superior court of Cook county, on the first day of the term thereof to be holden at the court-house, in the
50 city of Chicago, in said Cook county, on the first Monday of November next, to answer unto Gertrude H. Hardin in a plea of ejectment, to the damage of said plaintiff, as it is said, in the sum of ten thousand dollars; and have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness John J. Healy, clerk of our said court, and the seal thereof, at Chicago aforesaid, this 2nd day of October, A. D. 1882.

[SEAL.] JNO. J. HEALY, *Clerk.*

Served this writ on the within-named defendant, Joseph P. Ord, by reading the same to him this 24th day of October, 1882; the other defendant not served by order of pl'ff's att'y.

O. L. MANN, *Sheriff,*
By ELIAS SHIPMAN, *Deputy.*

P'd 75c.

And afterwards, to wit, on the 13th day of November, in the year last aforesaid, to wit, A. D. 1882, there were filed in the office of the clerk of the superior court of Cook county certain appearances, motion, petition, and bond, which are in words and figures following, to wit:

STATE OF ILLINOIS, } ss.:
Cook County, }

Superior Court. Nov. Term, A. D. 1882.

51 GERTRUDE H. HARDIN } Ejectment.
vs.
JOSEPH P. ORD and KILLAM SMITH. }

We do hereby enter our appearance in the above-entitled cause for the sole purpose of having Conrad N. Jordan, of New York city (who is the landlord of Killam Smith and the grantee prior to service herein of said Ord), substituted for us and both of us as sole defendant in the above cause, hereby consenting and insisting upon said substitution. J. I. & F. I. Bennett are authorized to appear for us and see that said substitution is made.

J. P. ORD.
K. SMITH.

STATE OF ILLINOIS, } ss.:
Cook County, }

Superior Court. Nov. Term, 1882.

GERTRUDE H. HARDIN } 84150, 7993. Ejectment.
vs.
JOSEPH P. ORD and KILLAM SMITH. }

I do hereby enter my appearance in the above-entitled cause and

waive service of process therein provided that I am substituted as the sole defendant in said cause in place of Joseph P. Ord
52 and Killam Smith. J. I. & F. I. Bennett are authorized to appear as my attorneys for the purpose of said substitution and other purposes.

CONRAD N. JORDAN.

STATE OF ILLINOIS, } ss:
Cook County, }

Superior Court. Nov. Term, 1882.

GERTRUDE H. HARDIN
vs.
JOSEPH P. ORD and KILLAM SMITH. } Ejectment.

And now come Conrad N. Jordan, Joseph P. Ord, and Killam Smith, by J. I. & F. I. Bennett, for the purpose of this motion only, and move the court to substitute said Conrad N. Jordan as sole defendant in the above-entitled suit in the place of said defendants, Ord and Smith, in accordance with stipulation filed, the said Ord having conveyed to said Jordan prior to service and the said Smith being the tenant of said Jordan and declining to defend.

J. I. & F. I. BENNETT,
Attorneys for Jordan, Ord, & Smith.

In the Superior Court of Cook County, State of Illinois. Nov. Term, A. D. 1882.

53 GERRTRUDE H. HARDIN, Plaintiff,
vs.
CONRAD N. JORDAN, Defendant. } Petition for Removal to the Circuit Court of the United States, Northwestern District of Ill.

To said superior court:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of different States, and that the petitioner, who is the sole defendant, was at the time of the commencement of this suit and at the time he became such sole defendant and still is a citizen of the State of New York, and that Gertrude H. Hardin, who is sole plaintiff, was then and still is a citizen of the State of Illinois.

And your petitioner offers herewith a bond, with good and sufficient surety, for his entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully
54 or improperly removed thereto; and he prays this honorable court to proceed no further herein, except to make the order of removal required by law and to accept the said surety and bond

and to cause the record herein to be removed into said circuit court of the United States in and for the northern district of Illinois; and he will ever pray.

CONRAD N. JORDAN, *Petitioner.*

J. I. & F. I. BENNETT,
Att's for Petitioner.

STATE OF ILLINOIS, } ss:
Cook County, }

I, Frank I. Bennett, being duly sworn, do say that I am a member of the firm of J. I. & F. I. Bennett, the attorneys for the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

FRANK I. BENNETT.

Subscribed and sworn to before me this 13th day of November, A. D. 1882.

JNO. J. HEALY, *Clerk.*

Know all men by these presents that I, Conrad N. Jordan, as principal, and John I. Bennett and Frank I. Bennett, as sure-
55 ties, are held and firmly bound unto Gertrude H. Hardin in the penal sum of five hundred dollars, the payment whereof, well and truly to be made unto said Gertrude H. Hardin, her heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally and firmly, by these presents, yet upon these conditions: that the said Conrad N. Jordan having petitioned the superior court of Cook county, State of Illinois, for the removal of a certain cause therein pending, wherein Gertrude H. Hardin is plaintiff and Conrad N. Jordan is defendant, to the circuit court of the United States in and for the northorn district of Illinois:

Now, if the said Conrad N. Jordan, your petitioner, shall enter into said circuit court of the United States on the first day of its next session a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 13th day of November, A. D. 1882.

CONRAD N. JORDAN.
JOHN I. BENNETT.
FRANK I. BENNETT.

56 STATE OF ILLINOIS, } ss:
Cook County, }

We, John I. Bennett and Frank I. Bennett, of said county, the sureties named in the foregoing bond, being severally duly sworn, do depose and say that we are both residents of the State of Illinois and property-holders therein; that we are each separately worth the

sum of five hundred dollars over and above all our several debts and liabilities and exclusive of property by law exempt from execution; that we both have property in the State of Illinois of the value of more than five hundred dollars. We further state that we severally executed the bond hereto annexed as surety; that we know the handwriting of Conrad N. Jordan, who executed the same as principal, and that his signature thereto is genuine.

JOHN I. BENNETT.
FRANK I. BENNETT.

Subscribed and sworn to before me this 13th day of November, A. D. 1882.

JNO. J. HEALY, *Clerk.*

And on the day and year last aforesaid, to wit, November 13th, A. D. 1882, the same being one of the days of the November term of said court, the following, among other, proceedings were had in said court and entered of record, to wit:

57 GERTRUDE H. HARDIN } 84150. Ejectment.
vs.
JOSEPH P. ORD *et al.* }

On the stipulation of the parties to this suit, this day filed, it is ordered that all papers and proceedings in this cause be, and are hereby, amended by substituting Conrad N. Jordan as sole defendant.

And afterwards, to wit, on the 18th day of November, in the year last aforesaid, to wit, A. D. 1882, there was filed in the office of the clerk of said court a certain notice, which is in words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of Cook County. November Term, A. D. 1882.

GERTRUDE H. HARDIN }
vs. } Ejectment. Cases No. 7991 & 7993.
CONRAD N. JORDAN. }

To Messrs. Barton & Chamberlain, attorneys for said plaintiff:

You are hereby notified that on Saturday, the 18th day of November, A. D. 1882, at — m., or as soon thereafter as counsel can be heard, we shall, before his honor Judge Gary, in the room usually occupied by him as a court-room, in said county, move
58 the court for orders in said several cases staying further proceedings therein, and for the certifying of said several cases to the United States circuit court for the northern district of Illinois; that there was filed in each of said causes, on the 13th inst., a proper

bond, petition, and other papers for the removal thereof; at which time and place you can appear, if you see fit.

Dated Nov. 17, 1882.

J. I. & F. I. BENNETT,
Attorney- for Defendant.

We hereby accept service of the above notice.

BARTON & CHAMBERLAIN,
Attorneys for Plaintiff.

And on, to wit, the day and year last aforesaid, to wit, November 18th, A. D. 1882, the same being one of the days of the November term of said court, the following, among other, proceedings were had in said court and entered of record, to wit:

GERTRUDE H. HARDIN
vs. } 84150. Ejectment.
CONRAD N. JORDAN.

On motion of defendant's attorney it is ordered, on filing petition and bond, that this cause be, and is hereby, transferred to the United States circuit court in and for the northern district of Illinois, and that the clerk of this court do forthwith transmit to said
59 United States circuit court a full and complete transcript of all papers and pleadings filed in said cause, together with all orders made and entered of record herein.

STATE OF ILLINOIS, }
County of Cook, } *ss.*:

I, John J. Healy, clerk of the superior court of Cook county, in and for the State of Illinois, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record in a certain cause lately pending in said court, on the common-law side thereof, wherein Gertrude H. Hardin was plaintiff and Conrad N. Jordan, defendant.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at Chicago, this 27th day of November, A. D. 1882.

JNO. J. HEALY, *Clerk.*

(Endorsed:) Filed Dec. 4, 1882. W. H. Bradley, clerk.

Afterwards, to wit, on the fifth day of December, 1882, came the defendant, by his attorney, and filed in said clerk's office his plea in said entitled cause; which said plea is in the words and figures following, to wit:

60 In the Circuit Court of the United States, Northern District of Illinois. December Term, 1882.

CONRAD N. JORDAN
ats.
GERTRUDE H. HARDIN. } Ejectment.

And the defendant, by John I. Bennett, his attorney, comes and defends the wrong and when, &c., and says that he is not guilty of unlawfully withholding the tenements in the said declaration mentioned, or any part thereof, in manner and form as the plaintiff has above thereof complained against him.

And of this defendant puts himself upon the country, &c.

JOHN I. BENNETT,
Attorney for Defendant.

Endorsed: Filed Dec. 5th, 1882. Wm. H. Bradley, clerk.

Afterwards, to wit, on the seventeenth day of January, 1883, came the defendant, by his attorney, and filed in said clerk's office his motion to consolidate in said entitled cause; which said motion is in the words and figures following, to wit:

61 United States Circuit Court, Northern District of Illinois.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } 547. Ejectment.

And now comes the said defendant, by John I. Bennett, his attorney, and moves the court to consolidate the three cases following the above-entitled case and numbered 548, 549, & 550 with the above-entitled case, because—

First. The parties, plaintiff and defendant, are the same.

Second. Substantially the same proof will be required to support both the plaintiff's and defendant's cases in all four suits.

Third. The declarations are alike, except as to the descriptions of the several tracts involved.

Fourth. A judgment for plaintiff or defendant will be equally capable of enforcement in the consolidated case as in the said several cases; and,

Fifth. A consolidation will result in a great saving of time and expense to both court and parties.

JOHN I. BENNETT,
Att'y for Def't.

Endorsed: Filed Jan'y 17, 1883. Wm. H. Bradley, clerk.

62 On the same day, to wit, on the seventeenth day of January, 1883, in the December term of said court, 1882, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, in the following entry, to wit:

Order.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } 18197. Ejectment.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } 18198. Ejectment.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } 18199. Ejectment.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } 18200. Ejectment.

Now comes the defendant in said four entitled causes, by John I. Bennett, Esq., his attorney, and on his motion and with notice to the plaintiff's attorney it is ordered by the court that said four entitled causes, wherein Gertrude H. Hardin is the plaintiff in each and Conrad N. Jordan is the defendant in each, be, and the same are hereby, consolidated, and that they proceed as one case.

63 Afterwards, to wit, on the first day of February, 1883, in the December term of said court, 1882, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment.

Now come the parties, by their attorneys, and the defendant, by his attorney, moves the court for leave to withdraw the pleas filed herein and to file a demurrer to the declaration; and, after hearing the arguments of counsel, the court sustains said motion and gives leave to withdraw said pleas and to file a demurrer.

On the same day, to wit, on the first day of February, 1883, came the defendant, by his attorneys, and filed in said clerk's office his demurrer in said entitled cause; which said demurrer is in the words and figures following, to wit:

64 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois,

In the Circuit Court in and for said District.

CONRAD N. JORDAN
ats. } Ejectment.
GERTRUDE H. HARDIN.

And now comes the said defendant and says that the matters and things set forth in said consolidated declaration in said consolidated cause are insufficient in law and this defendant ought not to be required to answer the same.

JOHN I. BENNETT,
EDSALL, HAWLEY & EDSALL,
Att'ys for Def't.

Endorsed: Filed Feb'y 1, 1883. Wm. H. Bradley, clerk.

65 Afterwards, to wit, on the third day of February, 1883, in the December term of said court, 1882, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN
vs. } Ejectment.
CONRAD N. JORDAN.

Now come the parties, by their attorneys, and the plaintiff, by her attorney, confesses the demurrer of the defendant to the declaration herein; and, on motion, leave is given the plaintiff to amend her declaration herein by Monday morning next.

Afterwards, to wit, on the twelfth day of February, 1883, in the December term of said court, 1882, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN
vs. } Ejectment.
CONRAD N. JORDAN.

Now come the parties, by their attorneys, and, on motion of the defendant, by his attorney, it is ordered that the amended
66 declaration herein be stricken from the files, with leave to the plaintiff to file an amended declaration by Saturday next.

Afterwards, to wit, on the sixteenth day of February, 1883, came the

plaintiff, by her attorneys, and filed in said clerk's office her amended declaration in said entitled cause; which said amended declaration is in the words and figures following, to wit:

67 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

Circuit Court of the United States.

GERTRUDE H. HARDIN } Ejectment. Consolidated Cases.
vs.
CONRAD N. JORDAN. }

And now comes the said plaintiff, Gertrude H. Hardin, by Barton & Chamberlain, her attorneys, and, by leave of court first had and obtained, exhibits this her amended declaration and complains of Conrad N. Jordan, who has heretofore been substituted as sole defendant in lieu of Joseph P. and Jabez A. Smale, Killam Smith, Benjamin Fogle, and Thomas Cash, original defendants herein, of a plea of ejectment—

For that whereas the plaintiff, on the first day of September, in the year 1882, was possessed of a certain parcel of land, with the appurtenances, lying in the county of Cook, in the district aforesaid, to wit, the southeast fractional quarter of section nineteen (19), the northeast fractional quarter of section thirty (30), and the east fraction of the southeast quarter of section thirty (30), all in township thirty-seven (37) north, range fifteen (15) east, of the third principal meridian, together with the accretions and relictions forming part thereof and appertaining thereto; which said tenements the plaintiff claims in fee; and, the plaintiff being so thereof possessed, the
68 defendant afterwards, to wit, on the first day of September, 1882, entered into such part of said accretions and relictions, being a part of said tenements which lies eighty rods on each side of the east and west half-section line running through said section thirty (30) extended east, and between the north and south section line running between sections seventeen (17) and eighteen (18), in said township extended south, and the north and south half-section line running through sections seventeen (17) and twenty (20), in said township extended south; also that part which lies north of the east and west half-section line running through said section thirty (30) extended east, and west of the north and south section line running through sections seventeen (17) and eighteen (18), in said township extended south, and south of the east and west section line running between said sections nineteen (19) and thirty (30) extended east; also that part which lies west of the north and south section line between sections seventeen (17) and eighteen (18), in said township extended south, and east of a line eighty (80) rods west of and parallel to said section line extended, and south of the east and west half-section line running through said section thirty (30) extended east; also that part which lies east of the north and south section line between sections seventeen (17) and eighteen (18), in said township extended south, and north of the east and west section

line between sections nineteen (19) and thirty (30) extended east
and west of the north and south half-section line running
69 through sections 17 and twenty (20), in said township ex-
tended south, and south of the east and west half-section
line running through said sections 19 and twenty (20) extended
and now unlawfully withholds from the plaintiff the possession
thereof.

And for that whereas the plaintiff, on the first day of September
1882, was possessed of a certain parcel of land, with the appurte-
nances, lying in the county aforesaid, to wit, that part of the accre-
tions and relictions attached to and forming a part of the southeas
fractional quarter of section nineteen (19), the northeast fractiona
quarter of section thirty (30), and the east fraction of the southeas
quarter of section thirty (30), township thirty-seven (37) north
range fifteen (15) east, of the third principal meridian, bounded and
described as follows, to wit: That part of said accretions and re-
lictions which lies eighty rods on each side of the east and west half
section line running through said section thirty (30) extended east
and between the north and south section line running between sec-
tions seventeen (17) and eighteen (18), in said township extended
south, and the north and south half-section line running through
sections seventeen (17) and twenty (20), in said township extended
south; also that part which lies north of the east and west half-sec-
tion line through said section thirty (30) extended east, and west of
the north and south section line running through sections seven-
teen (17) and eighteen (18), in said township extended
70 south, and south of the east and west section line running
between said sections nineteen (19) and thirty (30) extended
east; also that part which lies west of the north and south section
line between sections seventeen (17) and eighteen (18), in said town-
ship extended south, and east of a line eighty (80) rods west of and
parallel to said section line extended, and south of the east and west
half-section line running through said section thirty (30) extended
east; also that part which lies east of the north and south section
line between sections seventeen (17) and eighteen (18), in said town-
ship extended south, and north of the east and west section line
between sections nineteen (19) and thirty (30) extended east, and
west of the north and south half-section line running through sec-
tions seventeen (17) and twenty (20), in said township extended
south, and south of the east and west half-section line running
through said sections nineteen (19) and twenty (20) extended; which
tenements plaintiff claims in fee and now unlawfully withholds
from the plaintiff the possession thereof, to the damage of the plain-
tiff of forty thousand ($40,000) dollars, and therefore she brings her
suit, &c.

BARTON & CHAMBERLAIN,
Plaintiff's Attorneys.

Endorsed: Filed Feb. 16, 1883. Wm. H. Bradley, clerk.

71 Afterwards, to wit, on the twenty-third day of February,
1883, in the December term of said court, 1882, in the record

of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment.

Now come the parties, by their attorney, and, on motion of the plaintiff, by her attorney, leave is given her to take the deposition of Isaac R. Hitt before P. A. Hoyne, Esq., a commissioner of this court.

Afterwards, to wit, on the twenty-fourth day of February, 1883, in the December term of said court, 1882, in the record of the proceedings thereof in said entitled cause, before Hon. Romanza Bunn, district judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment.

Now comes the defendant, by his attorneys, and submits to the court the demurrer of the defendant to the amended declaration herein, and the court takes the same under advisement.

72 Afterwards, to wit, on the second day of March, 1883, in the December term of said court, 1882, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment.

The court, having considered and being now fully advised upon the demurrer of the defendant to the amended declaration filed herein on the — day of February last, sustains the same; and, on motion of the plaintiff, by her attorney, leave is given her to further amend her declaration herein.

Afterwards, to wit, on the fifth day of March, 1883, came the plaintiff, by her attorneys, and filed in said clerk's office her amended declaration in said entitled cause; which said amended declaration is in the words and figures following, to wit:

73 UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

Circuit Court of the United States.

GERTRUDE H. HARDIN
v.
CONRAD N. JORDAN. } Ejectment. Consolidated Cases.

And now comes the said plaintiff, Gertrude H. Hardin, by Barton & Chamberlain, her attorneys, and, by leave of court first had and obtained, exhibits this her amended declaration and complains of Conrad N. Jordan, who has heretofore been substituted as sole defendant in lieu of Joseph P. and Jabez A. Smale, Killam Smith, Benjamin Fogle, and Thomas Cash, original defendants herein, of a plea of ejectment—

For that whereas the plaintiff, on the first day of September, in the year 1882, was possessed by mesne conveyances of certain parcels or tracts of land and premises, with their appurtenances, which were conveyed to one John Holbrook by patent of the United States dated May, 1841, which said parcels or tracts of land and premises, with certain accretions and relictions, are lying and being in the county of Cook, in the State and district aforesaid, having a water front upon Wolf Lake, a body of water in the county and State aforesaid, denominated in the Government survey on which said Holbrook patent was granted a "navigable lake."

74 Which said parcels or tracts of land and premises may be particularly described as follows, to wit:

The southeast fractional quarter of section nineteen (19), the northeast fractional quarter of section thirty (30), and the east fraction of the southeast quarter of section thirty (30), all in township thirty-seven (37) north, range fifteen (15) east, of the third principal meridian, and to which belong, appertain, and form a part thereof by virtue of the said patent of 1841 certain accretions and relictions aforesaid, which are accumulations and formations of soil or land gradually and imperceptibly formed or made by the waters of said Wolf Lake, which may be particularly described as follows, to wit: All the accretions and relictions which lie eighty rods on each side of the east and west half-section line running through said section thirty (30) extended east, and between the north and south section line running between sections seventeen (17) and eighteen (18), in said township, extended south, and the north and south half-section line running through sections seventeen (17) and twenty (20), in said township, extended south; also all that part of said accretions and relictions which lies north of the east and west half-section line running through said section thirty (30) extended east, and west of the north and south section line running through sections seventeen (17) and eighteen (18), in said township, extended south, and south of the east and west section line running between said sections nine-

75 teen (19) and thirty (30) extended east.

Also all that part of said accretions and relictions which lies west of the north and south section line between sections seventeen

(17) and eighteen (18), in said township, extended south, and east of a line eighty (80) rods west of and parallel to said section line extended, and south of the east and west half of section line running through said section thirty (30) extended east.

Also all that part of said accretions and relictions which lies east of the north and south section line between sections seventeen (17) and eighteen (18), in said township, extended south, and north of the east and west section line between sections nineteen (19) and thirty (30) extended east, and west of the north and south half-section line running through sections seventeen (17) and twenty (20), in said township, extended south, and south of the east and west half-section line running through said sections nineteen (19) and twenty (20) extended; which said parcels or tracts of land and premises, with their said accretions and relictions, the plaintiff claims in fee, and avers that, being so thereof possessed, afterwards, to wit, on the first day of September, 1882, the said defendant entered into the possession thereof and now unlawfully withholds the same from the
76 plaintiff, to the damage of said plaintiff of forty thousand ($40,000) dollars, and therefore she brings her suit, &c.

BARTON & CHAMBERLAIN,
Plaintiff's Attorneys.

Endorsed: Filed Mar. 5, 1883. Wm. H. Bradley, clerk.

Afterwards, to wit, on the sixth day of March, 1883, came the defendant, by his attorneys, and filed in said clerk's office his demurrer to the amended declaration in said entitled cause; which said demurrer is in the words and figures following, to wit:

76½ UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States in and for said District.

CONRAD N. JORDAN } Ejectment.
ads. }
GERTRUDE H. HARDIN. }

And now comes the said defendant, by Edsall, Hawley and Edsall, and John I. Bennett, his attorneys, and says that the amended declaration filed herein on the fifth day of March, A. D. 1883, is not sufficient in law, and this defendant ought not to be required to answer the same, and this defendant assigns as special cause of demurrer that the said several pieces or parcels of land and each and every thereof attempted to be described and recovered in said declaration is and are so imperfectly described that a verdict or judgment could not be maintained thereon.

2. Each and every the pieces or parcels of land attempted to be described and set forth in said amended declaration is and are so imperfectly described that this defendant ought not to be required to plead to the same.

Except as to the three first described pieces or parcels of land in

said amended declaration, it is entirely uncertain what specific lands the plaintiff seeks to recover or claims in fee.

EDSALL, HAWLEY & EDSALL,
JOHN I. BENNETT, *Att'ys for Def't.*

Endorsed: Filed March 6, 1883. Wm. H. Bradley, clerk.

77 On the same day, to wit, on the sixth day of March, in the adjourned March term of said court, 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment.

Now come the parties, by their attorneys, and now comes on to be heard the demurrer of the defendant to the amended declaration filed herein on yesterday, and, after hearing the arguments of counsel, the court takes the same under advisement.

Afterwards, to wit, on the ninth day of March, in the adjourned March term of said court, 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment.

The court, having considered and being now fully advised upon the demurrer of the defendant to the amended declaration
78 filed herein on the fifth instant, sustains said demurrer, and, on motion of the plaintiff, by her attorney, leave is given her to further amend her declaration by to-morrow morning.

On the same day, to wit, on the ninth day of March, 1883, came the plaintiff, by her attorneys, and filed in said clerk's office her amended declaration in said entitled cause; which said amended declaration is in the words and figures following, to wit:

79 UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

Circuit Court.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment.

And now comes the said plaintiff, Gertrude H. Hardin, by Barton

& Chamberlain, her attorneys, and, by leave of court first had and obtained, exhibits this her amended declaration, and complains of Conrad N. Jordan, heretofore substituted as sole defendant in place of Joseph P. and Jabez A. Smale, Benjamin Fogle, Killam Smith, and Thomas Cash, original defendants herein, of a plea of ejectment:

For that whereas the plaintiff, on the first day of September, in the year 1882, was possessed of certain parcels of land, with the appurtenances, lying in the county of Cook and district aforesaid, to wit, the southeast fractional quarter of section nineteen (19), the northeast fractional quarter of section thirty (30), and the east fraction of the southeast quarter of section thirty (30), township thirty-seven (37) north, range fifteen east, of the third principal meridian, together with the accretions and relictions forming a part thereof, which said tenements the plaintiff claims in fee; and, the plaintiff being so thereof possessed, the defendant afterwards, to wit,
80 on the first day of September, 1882, entered into possession of the same, and now unlawfully withholds from the plaintiff the possession thereof, to the damage of the plaintiff of fifty thousand dollars; wherefore plaintiff brings suit.

BARTON & CHAMBERLAIN,
Plaintiff's Attorneys.

Endorsed: Filed March 9th, 1883. Wm. H. Bradley, clerk.

Afterwards, to wit, on the tenth day of March, 1883, came the defendant, by his attorneys, and filed in said clerk's office his demurrer to the amended declaration in said entitled cause; which said demurrer is in the words and figures following, to wit:

81 UNITED STATES OF AMERICA, } ss.:
Northern District of Illinois, }

Circuit Court of the United States in and for said District.

CONRAD N. JORDAN } Ejectment.
ads. }
GERTRUDE H. HARDIN. }

And the said defendant, by Edsall, Hawley and Edsall, his attorneys, comes and defends the wrong and injury when, &c., and says that the said amended declaration filed March ninth, A. D. 1883, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action against the said defendant, and he, the said defendant, is not bound by law to answer the same.

And this he is ready to verify; wherefore he prays judgment, &c.

EDSALL, HAWLEY & EDSALL,
Att'ys for Defendant.

This declaration is held good to recover the land definitely described by Government descriptions, but not to recover any relic-

tions or accretions appurtenant thereto or belonging there-
82 with lying outside such Government descriptions, and the defendant will have leave to plead within 24 hours.

March 13, 1883.

R. BUNN, *Judge.*

Endorsed: Filed March 10, 1883. Wm. H. Bradley, clerk.

83 On the same day, to wit, on the tenth day of March, in the adjourned March term of said court, 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment.

Now come the parties, by their attorneys, and now comes on to be heard the demurrer of the defendant to the amended declaration filed herein on the ninth instant, and, after hearing the arguments of counsel, the court takes the same under advisement.

Afterwards, to wit, on the thirteenth day of March, in the adjourned March term of said court, 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment.

The court, having considered and being now fully advised upon the demurrer of the defendant to the amended declaration
84 filed herein on the ninth of March instant, holds that said amended declaration is good to recover the land definitely described by Government description, but not to recover any relictions or accretions appurtenant thereto or belonging therewith lying outside such Government descriptions, and with leave to the defendant to plead to said amended declaration within twenty-four hours.

Afterwards, to wit, on the fourteenth day of March, 1883, came the defendant, by his attorneys, and filed in said clerk's office his pleas in said entitled cause; which said pleas are in the words and figures following, to wit:

85 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States in and for said District.

CONRAD N. JORDAN *ads.* GERTRUDE H. HARDIN. } Ejectment.

And now comes the said defendant, by John I. Bennett and Edsall, Hawley and Edsall, his attorneys, and says that he is not guilty of withholding the premises claimed by the plaintiff, to wit, the southwest fractional quarter of section nineteen (19), the northwest fractional quarter of section thirty (30), and the west fraction of the southeast quarter of section thirty (30), township thirty-seven (37) north, range fifteen (15) east, of the third principal meridian, as the plaintiff hath alleged in his said amended declaration; and this he prays may be enquired of by the country.

EDSALL, HAWLEY & EDSALL,
JOHN I. BENNETT, *Att'ys for Def't.*

And for a further plea in this behalf said defendant says *actio non*, because he says that at the said time when, &c., and at the time
86 of commencing this suit he was not in possession of said premises described and set forth in said amended declaration, to wit, the southwest fractional quarter of section nineteen (19), the northwest fractional quarter of section thirty (30), and the west fraction of the southeast quarter of section thirty (30), township thirty-seven (37) north, range fifteen (15) east, of the third principal meridian, or any part thereof, and did not claim title or interest therein or in any part thereof; and this he prays may be enquired of by the country.

EDSALL, HAWLEY AND EDSALL,
JOHN I. BENNETT, *Att'ys for Def't.*

John I. Bennett, being first duly sworn, upon his oath says that he is one of the attorneys for the above-named defendant, Conrad N. Jordan, and that the matters and things stated in the said second plea by the said Jordan above pleaded are true; and further saith not.

JOHN I. BENNETT.

Subscribed and sworn to this 14 day of March, A. D. 1883.
FRANK I. BENNETT,
[SEAL.] *Notary Public.*

Endorsed: Filed March 14, 1883. Wm. H. Bradley, clerk.

87 Afterwards, to wit, on the seventeenth day of March, in the adjourned March term of said court, 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment.

Now come the parties, by their attorneys, and, on motion of the defendant, by his attorney, leave is given him to file amended pleas herein, which is done; and, on further motion, it is ordered that the plantiff reply to said pleas by Monday next.

On the same day, to wit, on the seventeenth day of March, 1883, came the defendant, by his attorneys, and filed in said clerk's office his amended pleas in said entitled cause; which said amended pleas are in the words and figures following, to wit:

88 UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States in and for said District.

CONRAD N. JORDAN
ads.
GERTRUDE H. HARDIN. } Ejectment.

And now comes the said defendant, by John I. Bennett and Edsall, Hawley & Edsall, his attorneys, and says that he is not guilty of withholding the premises claimed by the plaintiff, to wit, the southeast fractional quarter of section nineteen (19), the northeast fractional quarter of section thirty (30), and the east fraction of the southeast quarter of section thirty (30), township thirty-seven (37) north, range fifteen (15) east, of the third principal meridian, as the plaintiff hath alleged in his said amended declaration; and this he prays may be inquired of by the country.

EDSALL, HAWLEY & EDSALL,
JOHN I. BENNETT, *Att'ys for Def't.*

And for a further plea in this behalf said defendant says *actio non*, because he says that at the said time when, &c., and at the time of commencing this suit he was not in possession of said prem-
89 ises described and set forth in said amended declaration, to wit, the southeast fractional quarter of section nineteen (19), the northeast fractional quarter of section thirty (30), and the east fraction of the southeast quarter of section thirty (30), township thirty-seven (37) north, range fifteen (15) east, of the third principal meridian, or any part thereof, and did not claim title thereto or interest therein or in any part thereof; and this he prays may be inquired of by the country.

EDSALL, HAWLEY AND EDSALL,
JOHN I. BENNETT, *Att'ys for Def't.*

John I. Bennett, being first duly sworn, upon oath says that he is one of the attorneys for the above-named defendant, Conrad M.

Jordan, and that the matters and things stated in the above second plea by the said Jordan above pleaded are true; and further saith not.

JOHN I. BENNETT.

Subscribed and sworn to this 17th day of March, A. D. 1883.

FRANK I. BENNETT,
Notary Public. [SEAL.]

Endorsed: Filed March 17th, 1883. Wm. H. Bradley, clerk.

Afterwards, to wit, on the nineteenth day of March, 1883, came the plaintiff, by her attorneys, and filed in said clerk's office her similiter in said entitled cause; which said similiter is in the words and figures following, to wit:

90 UNITED STATES OF AMERICA, } ss.:
Northern District of Illinois, }

Circuit Court of the United States.

GERTRUDE H. HARDIN } Ejectment.
vs.
CONRAD N. JORDAN. }

And the plaintiff, as to the pleas of the defendant firstly and secondly herein pleaded, and whereof he has put himself upon the country, does the like.

BARTON & CHAMBERLAIN,
Pl'ff's Att'ys.

Endorsed: Filed March 19, 1883. Wm. H. Bradley, clerk.

91 Afterwards, to wit, on the thirtieth day of March, in the adjourned March term of said court, 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN } Ejectment.
vs.
CONRAD N. JORDAN. }

Now come the parties, by their respective attorneys, and, upon issue joined by agreement of the parties, by their attorneys, they waive the intervention of a jury and put themselves upon the court; and, after hearing a part of the evidence, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the thirty-first day of March, in the adjourned March term of said court, 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment.

Now come again the parties, by their attorneys, and, after hearing the concluding evidence upon the issue herein, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until Tuesday morning next.

92 Afterwards, to wit, on the third day of April, in the adjourned March term of said court, 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment.

Now come again the parties, by their attorneys, and, after hearing the arguments of the respective counsel upon the issue herein, the court takes the same under advisement.

Afterwards, to wit, on the twenty-eighth day of May, in the adjourned May term of said —, 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment.

Now come the parties, by their attorneys, and the court, having considered and being fully advised upon the matters herein, finds the defendant guilty of unlawfully withholding from the possession of the plaintiff the following-described lands, mentioned and described in the plaintiff's declaration, to wit: All the lands lying between the meander lines of said southeast fractional quarter of section nineteen (19), the northeast fractional quarter of section thirty (30), and the east fraction of the southeast quarter of section thirty (30), all in township thirty-seven (37) north of range fifteen east of the third principal meridian and the low-water mark of Hyde Lake, all said premises being situate in the county of Cook and State of Illinois. The court also finds the estate established in the plaintiff on the trial to be an estate in fee simple, and assesses her damages at one cent. It is thereupon considered and adjudged

by the court that the plaintiff do have and recover of the defendant possession of said land aforesaid described according to the force, form, and effect of her said recovery, and that she have a writ of possession therefor, and that she also have and recover of the defendant the said sum of one cent, her damages, together with her costs in this behalf expended, amounting to — dollars and — cents, and that she have execution therefor.

Afterwards, to wit, on the twelfth day of July, 1883, there was filed in said clerk's office a stipulation in said entitled cause; which said stipulation is in the words and figures following, to wit:

94 UNITED STATES OF AMERICA,
Northern District of Illinois.

March Term, A. D. 1883.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment.

It is stipulated by and between the parties to the above-entitled cause that, for the purpose of taking a new trial under the statute of the State of Illinois entitled "ejectment," the previous payment of the costs in the above cause is hereby waived to await the determination of the cause, and that judgment heretofore entered herein may be set aside and a new trial granted in pursuance of the said statute the same as if and with the same effect upon the rights of the parties to this cause to future new trials under said statute as though said costs had been paid by said Hardin previous to the redocketing and asking for said order setting aside said judgment and granting a new trial under the statute as aforesaid.

It is also further stipulated that the testimony already taken by the reporter at the said previous trial herein shall be used in the new trial, thereby not waiving any objections to said testimony which might be made if the witnesses were on the stand, nor preventing either party from calling any of the witnesses heretofore called to give further testimony in reference to the matters herein involved.

BARTON & CHAMBERLAIN,
Plaintiff's Att'ys.
J. I. & F. I. BENNETT,
Att'ys for Def't.

Endorsed: Filed July 12, 1883. Wm. H. Bradley, clerk.

95 On the same day, to wit, on the twelfth day of July, in the July term of said court, 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment.

By agreement of the parties, as per stipulation filed, it is ordered by the court that the judgment entered herein on the twenty-eighth day of May last be set aside and vacated and a new trial granted under the statute.

Afterwards, to wit, on the eighth day of December, in the adjourned October term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment.

On motion of the plaintiff, by E. S. Holbrook, Esq., her attorney, leave is given her to file an additional count to the declaration herein.

On the same day, to wit, on the eighth day of December, 1884, came the plaintiff, by her attorneys, and filed in said clerk's
96 office an additional count in said entitled cause; which said count is in the words and figures following, to wit:

Suit in Ejectment, Pending in the U. S. Circuit Court, Northern District of Ills.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN.

Additional Count, Filed by Leave of Court.

The said Gertrude H. Hardin, by her attorneys, complains of said defendant, Conrad N. Jordan, in a plea of ejectment—

For that whereas the said plaintiff, Gertrude H. Hardin, heretofore, to wit, on the first day of September, A. D. 1882, was the owner in fee simple of the following-described real estate, to wit, the southeast quarter of section nineteen and the northeast quarter of section thirty and the southeast quarter of section thirty, all of town. thirty-seven north of range fifteen east of 3d P. M., of said Cook county, State of Illinois (S. E. ¼ S. 19, N. E. ¼ sec. 30, & S. E. ¼ of sec. 30, T. 37 N., R. 15), with all accretions, alluvions, and relictions, to wit, all the land lying between the west boundary line of said southeast

quarter of section nineteen and the west line of said northeast quarter of section thirty and the middle line of the permanent water of the lake east of said line, sometimes designated and known as "Navigable Lake" and sometimes as "Wolf Lake," and also all the land lying between the sectional lines of said southeast quarter of
97 section thirty and said lake, and was in the possession thereof, claiming as such owner and claiming the right of actual possession as against all others unmolested; and, being so in possession, the said defendant, Conrad N. Jordan, afterwards, to wit, on said day, by his tenants, to wit, Jabez B. Smale, Benjamin Fogle, Christ. Rosenquist, Killam Smith (who was also his agent), and Thomas Cash, entered wrongfully and without legal right upon the said premises and ejected the said plaintiff therefrom, and from thence hitherto withheld and now withholds from said plaintiff the possession thereof, to the damage of said plaintiff of fifty thousand dollars, and therefore she brings suit.

By JESSE B. BARTON &
EDMUND S. HOLBROOK,
Her Attorneys.

DENT & BLACK, *Of Counsel.*

Endorsed: Filed Dec. 8, 1884. Wm. H. Bradley, clerk.

Afterwards, to wit, on the nineteenth day of December, 1884, came the defendant, by his attorneys, and filed in said clerk's office his pleas in said entitled cause; which said pleas are in the words and figures following, to wit:

98 UNITED STATES OF AMERICA, } ss.:
Northern District of Illinois, }

In the Circuit Court of the United States in and for said District.

CONRAD N. JORDAN } Ejectment.
ads. }
GERTRUDE H. HARDIN. }

And now comes the said defendant, by John I. Bennett and Edsall, Hawley & Edsall, his attorneys, and says that he is not guilty of withholding the premises claimed by the plaintiff, to wit, the southeast quarter of section nineteen (19), the northeast quarter of section thirty (30), and the southeast quarter of section thirty (30), township thirty-seven (37) north, range fifteen (15) east, of the third principal meridian, as the plaintiff hath alleged in his additional count to said amended declaration filed, on leave of court, December 8th, 1884; and this he prays may be enquired of by the country.

EDSALL, HAWLEY & EDSALL,
JOHN I. BENNETT, *Att'ys for Defendant.*

And, for a further plea in this behalf, said defendant says *actio non*, because he says that at the said time when, &c., and at the time of commencing this suit he was not in possession of so much

of said premises described and set forth in said additional
99 count to said amended declaration filed on leave of court, December 8th, 1884, as is described as follows, to wit, the southeast fractional quarter of section nineteen (19), the northeast fractional quarter of section thirty (30), and the east fraction of the southeast quarter of section thirty (30), township thirty-seven (37) north, range fifteen (15) east, of the third principal meridian, or any part thereof, and did not claim title thereto or interest therein or in any part thereof; and this he prays may be enquired of by the country.

EDSALL, HAWLEY & EDSALL,
JOHN I. BENNETT, *Att'ys for Defendant.*

John I. Bennett, being first duly sworn, upon his oath says that he is one of the attorneys for the above-named defendant, Conrad N. Jordan, and that the matters and things stated in the said above second plea by the said Jordan above pleaded are true; and further saith not.

JOHN I. BENNETT.

Subscribed and sworn to this 19th day of December, A. D. 1884.
[SEAL.] C. D. CROCKER,
Notary Public.

And plaintiff doth the like.

E. S. HOLBROOK, *His Att'y.*

Endorsed: Filed Dec. 19, 1884. Wm. H. Bradley, clerk.

100 Afterwards, to wit, on the tenth day of July, in the July term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment.

Now come the parties, by their attorneys, and, upon issue joined herein by agreement of the parties, as per stipulation filed, they waive the intervention of a jury, and for trial put themselves upon the court; and, after hearing a part of the evidence, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the fourteenth day of July, in the July term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment.

Now come again the parties, by their attorneys, and, after
101 hearing additional evidence without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the fifteenth day of July, in the July term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment.

Now come again the parties, by their attorneys, and, after hearing additional evidence, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the sixteenth day of July, in the July term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment.

102 Now come again the parties, by their attorneys, and, after hearing additional evidence without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the seventeenth day of July, in the July term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment.

Now come again the parties, by their attorneys, and, after hearing

additional evidence without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the eighteenth day of July, in the July term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

103 GERTRUDE H. HARDIN } Ejectment.
vs.
CONRAD N. JORDAN. }

Now come again the parties, by their attorneys, and, after hearing the concluding evidence, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed to a future day.

Afterwards, to wit, on the twenty-second day of July, in the July term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN } Ejectment.
vs.
CONRAD N. JORDAN. }

Now come again the parties, by their attorneys, and, after hearing a part of the arguments of counsel upon the issue herein, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

104 Afterwards, to wit, on the twenty-eighth day of July, in the July term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN } Ejectment.
vs.
CONRAD N. JORDAN. }

Now again come the parties, by their attorneys, and, after further hearing a part of the arguments of counsel upon the issue herein, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning.

Afterwards, to wit, on the twenty-ninth day of July, in the July term of said court, 1885, in the record of the proceedings thereof in

said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment.

Now again come the parties, by their attorneys, and the defendant has leave to file an amended plea herein, and thereupon the
105 further hearing of this cause is resumed, when, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning.

On the same day, to wit, on the twenty-ninth day of July, 1885, came the defendant, by his attorneys, and filed in said clerk's office his plea in said entitled cause; which said plea is in the words and figures following, to wit:

106 UNITED STATES OF AMERICA, } ss.:
Northern District of Illinois, }

In the Circuit Court of the United States in and for said District.

CONRAD N. JORDAN
ads.
GERTRUDE H. HARDIN. } Ejectment.

And now comes the defendant, by John I. Bennett and John B. Hawley, his attorneys, by leave of court first had and obtained, and for amended plea to the said amended declaration says he is not guilty of withholding the premises claimed therein by the plaintiff, or any or either or any part thereof, as the plaintiff hath alleged in said amended declaration, and this he prays may be enquired of by the country.

JOHN I. BENNETT,
JOHN B. HAWLEY,
Attorneys for Defendant.

Endorsed: Filed July 29th, 1885. Wm. H. Bradley, clerk.

107 Afterwards, to wit, on the thirtieth day of July, in the July term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment.

Now again come the parties, by their attorneys, and the hearing of the arguments of counsel upon the issue herein is resumed, and

the same being concluded and the court, not being fully advised in the premises, takes the same under advisement.

Afterwards, to wit, on the eighteenth day of January, 1886, there was filed in said clerk's office the special findings of the court in said entitled cause; which said special findings are in the words and figures following, to wit:

108 In the United States Circuit Court, Northern District of Illinois.

GERTRUDE H. HARDIN, Plaintiff,
vs.
CONRAD N. JORDAN, Defendant. } Ejectment. Consolidated Cases.

This cause having come on for hearing before the court without a jury, a jury having been waived in writing by the parties, and the court, having heard all the evidence in said cause, doth make in said cause the following special findings of facts:

(1.) That plaintiff is seized in fee of the southeast fractional ¼ of section nineteen (19), the northeast fractional ¼ and the east fraction of the southeast fractional ¼ of section thirty (30), all in township thirty-seven (37) north, of range fifteen (15) east, in Cook county, State of Illinois, as per patent from the United States of America to John Holbrook, plaintiff's ancestor, dated May 20, 1841, in which patent the grant of said lands is recited to be "according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general;" that said patent was based upon an entry by said John Holbrook, made in the year 1838, at the United States land office in Chicago, Illinois.

(2.) The Government survey of lands in fractional township thirty-seven (37) aforesaid was made in the years 1834 and 1835, and the field-notes thereof as to the lands in question were as follows, to wit:

109

Chs.

80.00 Set a post corner to secs. 29, 30, 31, & 32, T. 37 N., R. 15 E., from which a burr oak 24 inches dia. bears N. 10 E. 41 lks.; a burr oak 20 inches dia. bears S. 66½ E. 98 lks.; a red oak 14 inches dia. bears. S. 20½ W. 82 lks.; no tree near in sec. 30.

Land to timber all marsh; timber, burr, white, and red oak; 3rd-rate soil; timber very thin and poor.

West Between secs. 30 & 31, T. 37 N., R. 15 E., of 3rd P. M.

284 Intersect southeasterly margin of a navigable lake, where set a post for the corner to fractional secs. 30 & 31, T. 37 N., R. 15 E., from which a burr oak 18 inches dia. bears N. 81¼° E. 286 lks.; a burr oak 10 inches dia. bears south *S* 30¾° E. 177 lks.; sent my flagman around the southern extremity of lake and caused the flag to be set on the

opposite side thereof, on the line between secs. 30 & 31. I then offset S. 500 chs. to a point from which the flag set as aforesaid bears N. 79° 48′ W., making the distance across the lake 27.78 chs.; therefore at 2.84 more 27.78 equal to.

30.62 Set a post on the southwest bank of lake for the corner to fractional secs. 30 & 31, T. 37 N., R. 15 E., from which a burr oak 13 inches diameter bears N. 64¾° W. 149 lks.; a black oak 18 inches *inches* dia. bears S. 81° W. 183 lks.

31.50 Leave marsh on lake and enter timber, bears N. E.

110

39.75 Leave timber and enter marsh, bears N. E. & S. W.

40.00 Set ¼ sec. corner post, from which a burr oak 24 inches dia. bears N. 29¾° E. 209 lks.; a red oak 14 inches dia. bears N. 1½° W. 466 lks.; land 3rd-rate soil; thinly timbered with yellow, a burr oak, and red oak.

80.40 Intersect east boundary of T. 37 N., R. 14 E. 25 lks. north of the corner of secs. 25 & 36, where raised a mound, beneath which deposited 2 quarts charcoal, and set a post for the corner to secs. 30 & 36, T. 36 N., R. 15 E.; land all marsh; water from 4 to 12 inches deep.

East Between secs. 29 & 32, T. 37 N., R. 15 E., of the 3rd P. M.

5.97 Intersect the S. W. side of a navigable lake, where set a post corner to frac'l secs. 29 & 32, T. 37 N., R. 15 E., from which a burr oak 22 inches diameter bears N. 54° W. 76 lks.; a burr oak 24 inches dia. bears S. 18° W. 178 lks.; land 3rd-rate soil; thinly timbered with burr, white, & yellow oak.

North Between secs. 29 & 30, T. 37 N., R. 15 E., of the 3rd P. M.

14.50 Intersect bank of lake, where set a post for the corner to frac'l secs. 29 & 30, T. 37 N., R. 15 E., from which a burr oak 14 inches dia. bears N. 73° E. 186 lks.; a burr oak 24 inches dia. bears S. 78° E. 169 lks.; land 3rd-rate soil; thinly timbered with white, yellow, & burr oak. As the

111 remainder of this line is in the lake, I commence north at the corner to secs. 24 & 25, T. 37 N., R. 14 E., and run thence east.

East Between secs. 19 & 30, T. 37 N., R. 15 E., of the 3rd P. M.

Chs.

20.00 Leave marsh on a sandy ridge, bears N. & S.

24.00 Leave same and enter marsh.

26.57 Intersect left bank of the Little Kalamick river, run north, where set a post from which a willow 14 inches dia. bears S. 20° E. 48 lks.; a yellow oak 10 inches dia. bears N. 60 W. 339 lks. for the corner to frac. secs. 19 & 30, T. 37 N., R. 15 E.

28.35 Intersect right bank of the Little Kalamick river, where set a post for the corner to secs. 19 & 30, T. 37 N., R. 15 E., from which a burr oak 6 inches dia. bears S. 28¾° E. 27 lks.; a white oak 6 inches dia. bears N. 23° W. 32 lks.

30.00 Leave timber & enter marsh, bears N. & S.

37.50 Road bears north.
40.00 Set a post, from which a white oak 10 inches dia. bears S. 2½° W. 413 lks. No other tree near for ¼ sec. corner land; timber on sand ridges very poor—yellow oak; 3rd-rate soil; remainder all marsh.
41.00 Leave marsh and enter willow thicket, bears N. & S.
47.00 Leave willow thicket and enter timber, bears S. W. & N. E.
50.00 Indian trail, course north.
51.75 Intersect west side of navigable lake, bears northeasterly and southwesterly, where set a post corn'r to fractional secs. 19 & 30, T. 37 N., R. 15 E., from which a hackberry 17 inches dia. bears south 18° W. 96 lks.; an elm 26
112 inches dia. bears N. 4¼° W. 140 lks.; land to timber, marsh & willow swamp; timber, white, red, & burr oak, lynn, hackberry, &c.; undergrowth, hazel & briars; 1st-rate soil.

Commence at the corner to secs. 13 & 24, T. 37 N., R. 14 E., and run thence—

East Between secs. 18 & 19, T. 37 N., R. 15 E. of the 3rd P. M.
16.50 Enter a marsh, bears N. & S.
40.00 Raised a mound, in which set a post for ¼ sec. corner; land, except marsh, 3rd-rate soil, sandy ridges covered with white and yellow oak; timber very poor and scrubby;
Chs. marsh water 4 to 30 inches deep.
42.14 Intersect left bank of the Little Kalamick river, runs N. W., where raised a mound, beneath which deposited 2 quarts of charcoal, and set a post for the corner to fractional secs. 18 & 19, T. 37 N., R. 15 east.
44.98 Intersect right and northeasterly bank of the Little Kalamick river, where raised a mound, beneath which deposited 2 quarts of charcoal, and set a post for the corner to frac'l secs. 18 & 19, T. 37 N., R. 15 E.
59.00 Leave marsh on a narrow sandy ridge.
61.00 Leave ridge and enter marsh.
75.50 Leave marsh and enter timber, bears north.
80.00 Set post for the corner to frac'l secs. 17, 18, 19, & 20, T. 37 N., R. 15 E., from which a yellow oak 17 inches dia. bears N. 53¼° W. 108 lks.; a yellow oak 18 inches dia. bears S. 35¼° E. 150 lks.; a yellow oak 9 inches dia. bears N.
113 63¾° E. 187 lks.; land mostly marsh; water from 1 to 3 feet deep; ridges of sand covered very thinly with yellow oak timber; 3rd-rate soil.

South Between secs. 19 & 20, T. 37 N., R. 15 E., of the 3rd P. M.,
7.50 road; course northwardly.
12.00 Enter marsh, bear S. W.
22.00 Intersect northwesterly margin of lake, where sets a post, from which a red oak 22 inches dia. bears S. 81° W. 4.6 lks.; a red oak 36 inches dia. bears S. 81° W. 350 lks.

Land, the north 12.00 chs. thinly timbered with yellow and red oak, 3rd-rate soil; timber poor; marsh water from 6 to 40 inches deep.

Chs. May 24th, 1834.

East Between secs. 17 & 20, T. 37 N., R. 15 E., of the third P. M.,
1.25 road; course nearly north.
4.00 Enter a marsh, bears north.
40.00 Set a post for ¼ sec. corner, from which an aspen 10 inches dia. bears N. 18¾° W. 377 lks; a yellow oak 16 inches dia. bears N. 64° E. 348 lks. Land all marsh, except first 4.00 chs.; sandy ridge, timbered with white, yellow, & red oak, aspen, &c.; 3rd-rate soil.
43.50 Leave marsh and enter timber, bears N. & S.
57.27 Red oak 22 inches dia.
64.15 Intersect line between Indiana and Illinois 244 chs. north of the 158th mile corner, where set a post corner to fractional secs. 17 & 20, T. 37 N., R. 15 E., from which a white oak 12 inches dia. bears S. 20¼° W. 20 lks., a red oak
114 22 inches dia. bears N. 51¼° W. 31 lks.; land to timber all marshy; water from 6 to 15 inches deep; timber good; white, red, and black oak, elm, &c.; 2nd-rate soil.

* * * * * * *

Measuring chain compared with standard and found to be ¼ inch too long; adjusted thereto; commence at the corner established on the line between Indiana and Illinois, re-established by Mr. Sibly, D. S., which corner agrees with the description furnished by Mr. Sibley, viz. (set post on the south margin of lake, aspen 6° S. 37° E. 106, no other), and run thence along the southwest margin of lake along frac. sec. 32, T. 37 N., R 15 E., of the 3rd P. M., as follows, viz:

N. 45° W. 30.00 chains.
N. 50° W. 20.00 do.
N. 60° W. 10.00 do.
N. 55° W. 10.00 do.
N. 22° W. 4.00 do. to the corner to frac'l secs. 29 & 32, T. 37 N., R. 15 E. Land, 3rd-rate soil, very thinly timbered with yellow and burr oak.

Thence from said corner to frac'l secs. 29 & 30, along the S. W. margin of lake, along frac'l sec. 29, T. 37 N., R. 15 E., of the 3rd P. M., as follows, viz:

North 10.00 chains.
N. 45° W. 3.00 do.
N. 64½° W. 4.00 do.
N. 20° W. 8.71 do. to the corner to frac'l secs. 29 & 30, T. 37
115 N., R. 15 E. Land, soil 3rd rate, very thinly timbered with yellow and burr oak.

Thence from said corner to frac'l secs. 29 & 30 along the southeasterly margin of lake, along frac'l sec. 30, T. 37 N., R. 15 E., of the 3rd P. M., as follows, viz:

S. 11° W. 10.00 chains.
S. 12° W. 4.00 do.
S. 8° W. 0.78 do. to the corner to frac'l secs. 30 & 31, T. 37 N., R. 15 E. Land all marsh, not fit for cultivation.

Thence from said corner to frac'l secs. 30 & 31 along the southerly margin of lake, along frac'l sec. 31, T. 37 N., R. 15 E., of the 3d P. M., as follows, viz:

S. 20° W. 15.00 chs.
S. 54° W. 10.00 do.
N. 61¼° W. 13.68 do.
N. 10¼° W. 13.00 "
N. 13° W. 0.66 do. to the corner to frac'l secs. 30 & 31, T. 37 N., R. 15 E. Land all marsh; water from 1 foot to 2½ feet deep.

Thence from said corner to frac'l secs. 30 & 31 along the S. W. margin of lake, along frac'l sec. 30, T. 37 N., R. 15 E., of the 3rd P. M., as follows, viz:

N. 10° W. 20.00 chains.
N. 5° W. 20.00 do.
N. 5° E. 15.00 do. to the outlet of lake 40 lks. wide; a rapid current.

116 N. 14° E. 26.15 chains to corner to frac'l secs. 19 & 30, T. 37 N., R. 15. E. Land 3rd-rate soil to outlet and very thinly timbered with yellow and burr oak from outlet; 1st-rate soil, well timbered with white, yellow, & burr oak, hickory, &c., undergrowth hazle & briars.

Thence from said corner to frac'l secs. 19 & 30 along southwestern margin of lake, along frac'l sec. 19, T. 37 N., R. 15 E., of the 3rd P. M., as follows, viz:

N. 20° E. 15.00 chains.
N. 25° E. 15.00 do.
N. 28¾° E. 35.10 do. to the corner to secs. 19 & 20, T. 37 N., R. 15 E. Land 1st-rate soil, well timbered with white, yellow, and burr oak, hickory, lynn, &c., undergrowth hazle and briars.

Thence from said corner to frac'l secs. 19 & 20 along the northern margin of lake, along frac'l sec. 20, T. 37 N., R. 15 E., of the 3rd P. M., as follows, viz:

N. 85° E. 10.00 chains.
S. 70° E. 10.00 do.
S. 55° E. 10.00 do.
S. 20° E. 15.00 do.
S. 80° E. 10.00 do.
S. 60° E. 14.00 do.
S. 46° E. 11.60 do.
S. 41° E. 2.00 do. to the temporary post set by me on the line between Indiana and Illinois at the intersection of said line with the lake. Land all marsh; water from 6 inches to 3½ feet deep.

June 17th, 1834.

117 3. The plat made from said survey and field-notes for the local land office, the surveyor general's office, and the General Land Office was as follows:

(Here follows plat marked page 118.)

119 E. J. E.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *March 8th*, 1883.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed tracing of the plat of township 37 north, range 15 east, 3d principal meridian, Illinois, is a true and literal exemplification of the official plat of said township formerly of record in the United States land office at Chicago, Illinois, subsequently of record in the United States land office at Springfield, Illinois, and now of record in the General Land Office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] N. C. McFARLAND,
Commissioner of General Land Office.

120 4. The body of water shown upon the plat referred to as a navigable lake was in fact meandered by the surveyor, the meander line being run substantially upon the margin of said lake, as shown by said plat, save as follows, viz: That the said line was carried across a certain ridge of land extending from the centre of fractional sec. 20, in said township, in a southerly direction towards the point of land shown in said plat as comprising the east fraction of the southeast quarter of sec. 30 and fractional section 29, in said township, said ridge or strip of land thus projecting into said body of water southerly about 220 rods, being of varying width and elevation and covered with timber—oak, hickory, elm, ash, poplar, linden, and hackberry—three feet in diameter and under; the width of said ridge, limiting it to dry land at ordinary stage of water, being over 28 rods at the north and of varying width, being in some places slightly wide and at some narrower, extending to a depression about 140 rods south, and thence south of a general character but slightly narrower
121 and lower a distance of about 80 rods, at the last-named point said ridge disappearing, and from there to a point south about 80 or 90 rods the bed and growth are of the same general character as the bed and growth along the margin of the lake, and on either side of the ridge reeds and coarse grass growing in the water and there being nothing but such growth to obstruct the flow of water from one side to the other, the depth at this point being sufficient at high water to enable skiffs and small boats to be rowed through from one side to the other, the water west having for many years been known as Hyde Lake, in ordinary speech, while that to the east has been currently known as Wolf Lake, said space or distance last described being marsh land at low water; that at the south limit of the tract last described is a small body of land known as Elm Island or Fogli's Place, of the extent of 1½ or 2 acres, upon which timber grows of the same character as that on said ridge, to the south of which for about 50 rods there is water at high stages and marsh at medium stages, at which point or distance the ridge appears again as dry land about 30 rods a little east of north from

the north point of the meander line of the point of land comprising fractional section 29, &c., before referred to, there being also a small knoll bearing a number of small trees or bushes about 20 rods northwest from the northerly point of the ridge last mentioned.

Upon the entire western margin of the water shown on the
122 plat and extending some 20 or 25 rods east from the meander line, and also on the east and west margin of the dry land of said ridge to the north, as well as in the space between said ridge and Elm Island and in the space above described south of said Elm Island, the vegetation is solely a marsh growth of reeds and coarse or swamp grass growing in the water and of a uniform character, and the same is true as to the southerly portion of the lake west of plaintiff's land in the east fraction of the southeast fractional ¼ of said section 30. The physical condition west of the meander of said east fraction, &c., is the same for a distance of 91 or more rods westerly as it is generally at and along said meander line, the same character of growth as aforesaid appearing in the water at ordinary and high stages for said distance west of said line, the greater part of plaintiff's said land in said east fraction of the southeast fractional quarter of said section 30 being wet and unfit for cultivation and only slightly higher than that to the west, there being $2\frac{4}{100}$ acres in said east fraction, treating the meander line as a boundary, in the form of a right-angle triangle, with its base resting on the south section line with the meander line as a western boundary thereof. The point at which to the south the open water of said lake ceases and marsh grass begins is several rods north of the south line of said section 30. The physical conditions of the land and water are substantially what they were at the time of the original survey; that said lake or lakes are not navigable waters.

123 (5.) At the time of said Government survey there was a natural outlet for said lake towards the northeast into Lake Michigan through Wolf river, said river being about 1½ miles long and from 6 to 14 feet in depth; but such outlet was and has continued to be subject to interruption by the formation of a sand bar across the mouth thereof upon the shore of Lake Michigan. There was also an outlet from the westerly portion of said lake into the Calumet river, shown on said plat as Little Kalamick, said outlet into the Calumet river running in a westerly direction through the fractional north ½ of said section 30 to its connection with said Calumet river.

(6.) The level of water in said lake or lakes is subject to fluctuations alike from the operation of the change of the level of Lake Michigan from storms, winds, &c., and also from the operation of rains, thaws, evaporation, &c.; but said "lake" or lakes is or are occupied by permanent water, and substantially the entire bottom thereof is below the mean level of Lake Michigan, and the greater portion of it is below extreme low water in said Lake Michigan, so that said "lake" or lakes never become entirely dry, nor has any considerable portion thereof within its margin, as shown by the said Government plat, ever been fit for cultivation except as to said Elm Island and said ridge hereinabove described.

(7.) That at times of high water, however produced, the water in said lake or lakes extends to and beyond the limits that it occupied at the time of said Government survey.

124 That a level of Lake Michigan has been adopted in all surveys in Cook county called datum; that the extreme rise and fall of Lake Michigan is from 5 feet above datum to one foot below datum; that the average level of water in Lake Michigan is about 1.8 feet above datum.

That the level of water in said lake or lakes when the same reaches the level existing at the time of the Government survey of 1834 and 1835 is 2.2 feet above datum and .4 ($\frac{4}{10}$) foot above the average level of Lake Michigan.

(8.) That defendant and those under whom defendant claimed, constituting the defendants in said original causes which were consolidated into the present case, entered into and took possession of the lands described in the plaintiff's declaration, except so much of the southeast fractional $\frac{1}{4}$ of section 19, the northeast fractional $\frac{1}{4}$ of section 30, and the east fraction of the southeast fractional $\frac{1}{4}$ of said section 30 as lay beyond and outside of the meander line as run upon the margin of said lake by said Government survey, and defendant was so in possession at the time of said suit and trial thereof. Upon the facts shown in evidence the plaintiff asked the court to hold and adjudge that, under the grant to plaintiff's ancestor, plaintiff, as a riparian proprietor, took to the centre of said so-called "navigable lake," and all the said lands granted to plaintiff's ancestor bordered upon said so-called "navigable lake;" but the court refused to so hold, and, on the contrary thereof,

125 held that the plaintiff's lands in said sections 19 and that part of 30 west of said lake were bounded by said lake, the right of possession extending to low-water mark in said lake; but as to said east fraction of the southeast $\frac{1}{4}$ of section 30 the court held that the plaintiff was bounded by the meander line run by the U. S. surveyor and not entitled to claim said lake as her boundary; to which plaintiff excepts, &c.

And the court further finds as a matter of fact that the value of the lands sought to be recovered by the plaintiff herein, but for which the court refuses her judgment, exceeds the sum of $5,000.

WALTER Q. GRESHAM,
Circuit Judge.

Endorsed: Filed Jan'y 18, 1886. Wm. H. Bradley, clerk.

126 On the same day, to wit, on the eighteenth day of January, 1886, in the December term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Judgment.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment.

This cause having come on for hearing before the court without a jury, the parties being represented by their respective counsel and a jury having been waived in writing, and the court, having heard all the evidence in said cause and also having heard the arguments of counsel and having heretofore taken said matter under advisement and being now fully advised in the premises and having filed herein special findings of facts and passed on the request of the plaintiff in that behalf, doth now adjudge and determine as follows, to wit: That as to the east fraction of the fractional southeast quarter of section thirty (30), township thirty-seven (37) north, range fifteen (15) east, of the third P. M., Cook county, Illinois, the defendant is not guilty.

It is further adjudged and determined that the plaintiff is seized in fee of the southeast fractional quarter of section nineteen
127 (19) and the northeast fractional quarter of section thirty (30), both in township thirty-seven (37) north, range fifteen (15) east, of the third P. M., Cook county, Illinois; that by the terms of the patent of said lands to John Holbrook, plaintiff's ancestor, the grant of said last-described lands was bounded by and extends to a body of water along the easterly line shown on the Government map or plat of the Government survey as a "navigable lake;" that plaintiff is entitled to claim to low water as her eastern boundary of said lands last described; that defendant, as to the parts of said last-described lands lying between the meander line run in the Government survey and the margin of said lake at low water, is guilty of unlawfully withholding the possession thereof from the plaintiff; and it is therefor- ordered and adjudged that the plaintiff have and recover of said defendant the possession of said lands so unlawfully withheld as aforesaid, including the dwelling-houses erected thereon by Andrew Ferrand and Chester B. Rushmore and any other structures thereon, and as to costs in this behalf they are apportioned at two-thirds (⅔) of all costs taxed in this cause to be paid by defendant and the remaining one-third by plaintiff, and that plaintiff have execution therefor and a writ of possession, &c. As to the residue of the lands described in plaintiff's declaration defendant is adjudged not guilty; to which judgment plaintiff, by her counsel, duly excepts.

128 On the hearing of said cause on said 18th day of January, 1886, the following exceptions were taken and were allowed by the court and made of record; which said exceptions are in the words and figures following, to wit:

Bill of Exceptions.

In the United States Circuit Court for the Northern District of Illinois.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } Ejectment. Consolidated Cases.

Be it remembered that on the trial of this cause in this term the defendant offered in evidence to sustain the issue on his part a certain map or plat purporting to show the location of the meander line run by the Government surveyor in the original survey of the lands in question.

In connection with the offer of said plat defendant called witnesses, who testified that said plat was made from actual survey, measurement, and levels; that in running said meander line no monuments of any kind were found upon the ground to fix its location, which was determined alone by courses and distances, as given in the
129 field-notes of said Government survey; that upon said plat the figures in red ink gave the elevations above or below datum, those below datum being preceded by a minus sign. The plat was drawn to show substantially all of the territory involved, the open space surrounded by shaded lines extending northeastwardly through the east half of section thirty, etc., and the like space in section twenty-nine, etc., being designed to represent water, the westerly portion being that known as Hyde Lake, the easterly portion being know- as Wolf Lake.

(Here follows diagram marked page 130.)

131 There was also testimony introduced tending to show that the level of the water at the date of said survey of Nov. 4, 1884, was 2.44 feet above datum.

Plaintiff, by her counsel, objected to the introduction of said plat and said testimony of such survey, etc., as irrelevant, immaterial, and incompetent; but the court overruled said objection and admitted the same; to which plaintiff duly excepted.

2. Defendant offered a plat or map of a survey of the bed of Wolf Lake made by Alexander Wolcott in 1874 for the Government Land Department. *They* also offered patents from the United States, dated 1881, to various parties for the territory embraced and lying within said meander line run by the surveyor in the original Government survey, and deeds from said patentees to Conrad N. Jordan, under which defendant deduced title. The said plat of said Wolcott survey was as follows:

(Here follows diagram marked page 132.)

133 E. DEPARTMENT OF THE INTERIOR, J. S. W.
GENERAL LAND OFFICE, S. J. D.
WASHINGTON, D. C., *Oct.* 27, 1882.

I, L. Harrison, acting Commissioner of the General Land Office, do hereby certify that the annexed copy of the plat of the original survey of township 37 north, range 15 east, 3d P. M., Illinois, embracing the plat of the survey by Alex. Wolcott in September, 1874, of a meandered lake in certain sections in said township, is a true and literal exemplification of the original plat on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] L. HARRISON,
Acting Commissioner of General Land Office.

134 There was also testimony introduced tending to show that at the time of said survey by said Wolcott, in 1874, said Wolcott found all of the witness trees called for in the field-notes of the Government surveyor of the original survey of township thirty-seven (37), etc.

Plaintiff objected to the introduction of said survey, patents, and deeds thereunder as incompetent, irrelevant, and immaterial; which objection was overruled by the court; to which ruling of the court allowing the introduction of said plat, the introduction of said several patents and of said several deeds thereunder plaintiff duly excepted.

3. Thereupon plaintiff offered in evidence the following documents, to wit:

Circular of the Land Department, Dated July 13th, 1874, Relating to the Survey of Lake Beds from which the Waters have Receded.

135 E.

Circular.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July* 13, 1874.

As inquiries arise in regard to the survey of the beds of meandered lakes or other similar bodies of water in districts where the office of surveyor general has been discontinued, the following is communicated as defining the conditions under which such lake beds are regarded as surveyable and as giving the proper mode of proceeding to have the same surveyed and to obtain title thereto:

The beds of lakes (not navigable), sloughs, and ponds over which the lines of the public surveys were not extended at the date of the original survey, but which from the presence of water at the date of such survey were meandered, are held to be the property of the United States, and whenever, by evaporation or the operation of any

other cause, natural or artificial, the waters of such lake, slough, or pond have so permanently receded or dried up as to leave within the unsurveyed area dry land fit in ordinary seasons for agricultural purposes such dry land is subject to survey and sale under the general laws regulating the disposal of the public domain.

Such surveys will be ordered, and upon approval disposition proceeded with in the following cases:

1st. Where the waters have so far permanently receded or disappeared as to permit during the ordinary surveying season (not on the ice) the actual extension of the lines of survey and the establishment and marking of corners in the manner required by law over the whole area of the bed of such former lake.

2d. Where the waters have not generally disappeared, but where they have so far permanently receded as to leave a margin of dry land fit for cultivation between the original meandered lines and the remaining waters of sufficient area to admit of the survey and of the establishment of at least three of the corners of a quarter section.

3d. The Commissioner of the General Land Office will consider the question of ordering a survey of margins not admitting the laying off of one hundred and sixty acres, but not less than forty acres.

Parties desiring the survey of such lands may make application in writing to the Commissioner of the General Land Office therefor, stating the approximate area and the situation of the tract with reference to the section, township, and range of the public surveys, the same to be illustrated by a diagram; the fact that the waters have disappeared in the manner or to the extent as specified in one of the three several above-specified cases, such statement to be accompanied with the affidavit of at least two credible and disinterested witnesses as to the disappearance of the waters, the probable quantity of land capable of being surveyed in the whole area lying between the original meandered line and the then margin of the waters, and showing what proportion of such area is fit for agricultural purposes. To insure prompt attention and decision by this office both the statement and affidavits required must be full and specific.

If upon examination of such statement, diagram, and proof it is found that such survey may be properly allowed, the parties applying will be so notified, and upon their designating to this office the name and residence of some competent and reliable surveyor, together with a statement from him in writing of the amount for which he is willing to execute the field-work of the survey and a certificate of some United States depository that the amount specified has been deposited to the credit of the United States "on account of individual depositors," the Commissioner will then issue the necessary instructions to the surveyor to enable him to execute the field-work of survey in accordance with the public land system.

To correct what seems to be a very general misapprehension as to the manner in which persons may proceed to perfect title who have made actual settlement on lands of the character herein designated and who claim or propose to claim under the pre-emption laws of the United States, it is remarked that in no event and at no

stage of the proceedings can their declaratory statements be received or filed in this office. Such declaratory statements must be filed in the local land office, and cannot be there received until after such survey has been made and the approved plat thereof filed in the local office.

It is proper to further state that the fact of having borne the expense of survey will give no priority of claim or right under existing laws to purchase the land or in any manner affect the vested interest of any party thereto, should such exist, as the land, when surveyed, will be subject to disposal according to the laws of Congress and the regulations of this office relative to the disposal of lands embraced in fragmentary surveys.

In case the lake bed is small and is so situated that no township, section, or quarter-section corners will need to be established by reason of such lake being situated within a given section or sections fully surveyed no deposit will be required, and upon proof being furnished this office as above of the disappearance of the water the premises will be platted, and the land can then be disposed of under existing laws.

Respectfully, S. S. BURDETT,
Commissioner.

[Endorsed:] Williamson's Report: Hawley, L. C., 1878, 126; 42 Wis., 263 ✓; 42 Wis., 225 ✓; 24 Ill., 521 ✓; 9 N. Ham., 461°; 62 Maine, 41°; Beaver Lake, Gresham; 1 Woolworth, Wis., Miller, 1865, 88; 4 Neb., 425°; 1 Bl'k, 222°; 23 Wallace, 66°. Barton, 26 Min., 31; 2 Black, 554; 7 Wallace, 272; 10 Mich., 127; 23 Wallace, 46; 93 Ill., 425; 49 Ill., 172; 37 Wis., 662; 18 Iow., 549; 10 N. W. R., 205. J. Cooley, 7 Bissell, 201; 3 Howard, overruled; 2d H., 372 (see 58 Ind.); Burdett's Report for 1874, p. 11.

136 Also a transcript, duly certified by the Commissioner of the General Land Office Feb'y 2, 1883, of certain petitions by Alice A. Condit, by Franklin A. Cleaveland, by Chester B. Rushmore, and by George A. Rowe, with various affidavits supporting the same, and also of the instructions for survey of the bed of Wolf Lake from the Commissioner of the General Land Office to Alexander Wolcott, dated Sept. 8, 1874, and of a report of the Commissioner to Hon. C. Schurz, dated March 15, 1878, as follows:

137 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *February 2d*, 1883.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copies of the applications of Alice A. Condit, dated Aug. 17, 1874; Franklin A. Cleaveland, dated Aug. 12th, 1874; Chester B. Rushmore, dated Aug. 18, 1874, and George A. Rowe, dated Aug. 13th, 1874, for the survey of certain lands within the meandered lines of Wolf Lake, in township 37 north, range 15 east, 3d principal meridian, Illinois, with the affidavits accompanying said applications, copy of instructions of the Commissioner of the

General Land Office, dated September 8, 1874, to Alexander Wolcott to extend the lines of the public surveys over Wolf Lake, in township 37 north, range 15 east, 3d principal meridian, Illinois, and copy of letter from the Commissioner of the General Land Office to the Secretary of the Interior, dated March 15, 1878, reporting upon House resolution dated January 29, 1878, calling upon the Secretary of the Interior for information as to the survey of the beds of Lakes Wolf and George, in Indiana, and the location of Sioux scrip upon the lands and patenting of said lands, are true and literal exemplifications of said applications and affidavits on file and of said instructions and letter of record in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of
138 Washington, on the day and year above written.

[SEAL.] N. C. McFARLAND,
Commissioner of General Land Office.

STATE OF ILLINOIS, }
Cook County. }

ALICE A. CONDIT, first being duly sworn, deposes and says that she is of lawful age and a widow and the head of a family; and she further states that she now makes application for and desires the survey of certain lands belonging to the United States situated in the county of Cook and State of Illinois, which lands lie within the Government meandered lines of a certain lake called Wolf Lake, in said county and in township thirty-seven north, range fifteen (15) east, of third P. M., and more particularly shown on a diagram hereto submitted to the Commissioner.

And she further states that the lands which she now desires and asks a survey of are described as follows (when the survey shall have been extended) viz: The fractional southwest quarter (within the Government meandered lines) of section twenty (20) and the northwest and the southwest quarters (within Government meandered lines) of section twenty-nine (29) and the S. E. fr. quarter (within Government meandered lines) of section twenty (20), all in township thirty-seven (37) north, range fifteen (15) east, of third P. M.; and the same is shown on the diagram herewith submitted and marked "Ff" and "Gg."

139 And she further states that in the southwest fr. quarter of section twenty (20) aforesaid the waters have disappeared to the extent that there is about sixty acres of dry land within the Government meandered lines in said southwest quarter, and that the remaining portion thereof is covered with shallow water, not exceeding two feet in depth, and the said quarter section can now be surveyed without difficulty and the corners of the same all established by actual survey.

That the northwest and the southwest quarters of section twenty-nine (29) aforesaid are in the following condition: The waters have so disappearad that there is within the Government meandered lines in the northwest quarter thereof about seventy-two acres of dry land

and in the southwest quarter about seventeen (17) acres of dry land fit for cultivation and agricultural purposes.

That the northwest corner of the northwest quarter and the northeast corner of the northwest quarter of said section twenty-nine (29) can be established now by actual survey, and the southwest corner of the northwest quarter is now dry and the lines can be easily extended.

That the northwest corner of the southwest quarter of section twenty-nine (29) is dry land, and the southwest corner of the same quarter has been established by Government survey, and that the southeast corner of the southwest quarter of section twenty-nine (29) can be established now by actual survey, being in shallow water.

140 And she states that a ridge runs diagonally to the southwest through the S. W. ¼ of twenty (20), the northwest and the southwest of twenty-nine (29) aforesaid, upon which there is sparse timber, some of large size and which was never covered with water, although within the Government meandered lines aforesaid.

And she refers to the subjoined diagram and makes the same a part of this her statement and application for a survey of said above-described lands.

ALICE A. CONDIT.

Subscribed and sworn to before me this 17th day of August, A. D. 1874.

JAMES F. GYLES,
Notary Public. [SEAL.]

STATE OF ILLINOIS, } ss:
Cook County, }

BUEL H. BARTLETT and WILLIAM ARNOT, first being duly and severally sworn, depose and say that they reside in the county of Cook and State of Illinois, and that they have no interest directly, or indirectly, in the application for survey herewith connected and have no interest, either directly or indirectly, in any claim, for pre-emption or otherwise, relating to the lands mentioned herein, but are entirely disinterested in the subject-matter of said lands and in the survey of the same; and they further, on their several oaths, state that they are acquainted with the lands hereinafter mentioned, being all within the Government meandered lines of Wolf Lake, and

141 they are acquainted with the present condition of said lands with regard to the fitness thereof for cultivation.

And they further state severally on their oaths that the waters have disappeared from the southwest fractional quarter (within the Government meandered lines) of section twenty (20) and the northwest quarter and the southwest quarter (within Gov't meandered lines) of section twenty-nine (29), all in township thirty-seven (37) north, range fifteen (15) east, of third P. M., in the county, so that in the tracts marked "Ff" and "Gg" there is now about 150 acres of dry land fit for cultivation and agricultural purposes, as shown upon the diagram herewith submitted, and that the whole of the southwest frac. quar. of section twenty aforesaid can be surveyed

and the corners thereof fixed and established by actual survey; that the portion of said southwest frac. quar. of twenty marked as covered by water is now covered by shallow water, not to exceed in depth two feet, and that the same is now rapidly disappearing from the most of said tract.

That — the said tract marked "Ff" the waters have disappeared entirely to the extent indicated by the diagram herewith submitted; that the corners can be established to the northwest corner of section twenty-nine and the northeast corner of the northwest quarter of the same section; also the southwest corner of the northwest quarter of the same section, and the lines extended to said corners without difficulty.

That the northwest corner of the southwest quarter of sec-
142 tion twenty-nine (29) aforesaid and the southeast corner of the southwest quarter of said section twenty-nine (29) can be established without difficulty by a competent surveyor and without making such survey on ice in any of the instances above named.

And these affiants refer to the diagram herewith submitted as showing a correct representation of the lands mentioned in this affidavit; and they further state that running diagonally to the southwest through frac. S. W. ¼ of sec. twenty (20) and the northwest and the southwest of said section twenty-nine (29) there is sparse timber scattered along, some of large size.

And they further state that they were present upon the land and made actual examination of the same, as stated hereinbefore.

BUEL H. BARTLETT.
WM. ARNOT.

Be it remembered that on this 13th day of August, A. D. 1874, before me, James F. Gyles, a notary public in and for the city of Chicago, Cook county, Illinois, personally appeared Buel H. Bartlett and William Arnot, who, in their own proper persons, subscribed the foregoing affidavit in my presence, and who were then by me each duly and severally sworn, and they and each of them stated upon their oaths that the foregoing affidavit by them sub-
143 scribed was and is true in substance and in fact.

In witness whereof I have hereunto set my hand and affixed my notarial seal this 13th day of August, A. D. 1874.

JAMES F. GILES,
Notary Public. [SEAL.]

STATE OF ILLINOIS, }
Cook County. }

To the Commissioner of General Land Office, Washington, D. C.:

The undersigned, Franklin A. Cleaveland, states that he is a citizen of the United States and resides in the county of Cook and State of Illinois.

And he further states that he hereby makes application and desires the survey of certain lands belonging to the United States situated in the county of Cook and State of Illinois, which lands lie within the Government meander of Wolf Lake, as shown on the

and in the southwest quarter about seventeen (17) acres of dry land fit for cultivation and agricultural purposes.

That the northwest corner of the northwest quarter and the northeast corner of the northwest quarter of said section twenty-nine (29) can be established now by actual survey, and the southwest corner of the northwest quarter is now dry and the lines can be easily extended.

That the northwest corner of the southwest quarter of section twenty-nine (29) is dry land, and the southwest corner of the same quarter has been established by Government survey, and that the southeast corner of the southwest quarter of section twenty-nine (29) can be established now by actual survey, being in shallow water.

140 And she states that a ridge runs diagonally to the southwest through the S. W. ¼ of twenty (20), the northwest and the southwest of twenty-nine (29) aforesaid, upon which there is sparse timber, some of large size and which was never covered with water, although within the Government meandered lines aforesaid.

And she refers to the subjoined diagram and makes the same a part of this her statement and application for a survey of said above-described lands.

ALICE A. CONDIT.

Subscribed and sworn to before me this 17th day of August, A. D. 1874.

JAMES F. GYLES,
Notary Public. [SEAL.]

STATE OF ILLINOIS, }
Cook County, } *ss:*

BUEL H. BARTLETT and WILLIAM ARNOT, first being duly and severally sworn, depose and say that they reside in the county of Cook and State of Illinois, and that they have no interest directly, or indirectly, in the application for survey herewith connected and have no interest, either directly or indirectly, in any claim, for pre-emption or otherwise, relating to the lands mentioned herein, but are entirely disinterested in the subject-matter of said lands and in the survey of the same; and they further, on their several oaths, state that they are acquainted with the lands hereinafter mentioned, being all within the Government meandered lines of Wolf Lake, and

141 they are acquainted with the present condition of said lands with regard to the fitness thereof for cultivation.

And they further state severally on their oaths that the waters have disappeared from the southwest fractional quarter (within the Government meandered lines) of section twenty (20) and the northwest quarter and the southwest quarter (within Gov't meandered lines) of section twenty-nine (29), all in township thirty-seven (37) north, range fifteen (15) east, of third P. M., in the county, so that in the tracts marked "Ff" and "Gg" there is now about 150 acres of dry land fit for cultivation and agricultural purposes, as shown upon the diagram herewith submitted, and that the whole of the southwest frac. quar. of section twenty aforesaid can be surveyed

and the corners thereof fixed and established by actual survey; that the portion of said southwest frac. quar. of twenty marked as covered by water is now covered by shallow water, not to exceed in depth two feet, and that the same is now rapidly disappearing from the most of said tract.

That — the said tract marked "Ff" the waters have disappeared entirely to the extent indicated by the diagram herewith submitted; that the corners can be established to the northwest corner of section twenty-nine and the northeast corner of the northwest quarter of the same section; also the southwest corner of the northwest quarter of the same section, and the lines extended to said corners without difficulty.

That the northwest corner of the southwest quarter of sec-
142 tion twenty-nine (29) aforesaid and the southeast corner of the southwest quarter of said section twenty-nine (29) can be established without difficulty by a competent surveyor and without making such survey on ice in any of the instances above named.

And these affiants refer to the diagram herewith submitted as showing a correct representation of the lands mentioned in this affidavit; and they further state that running diagonally to the southwest through frac. S. W. ¼ of sec. twenty (20) and the northwest and the southwest of said section twenty-nine (29) there is sparse timber scattered along, some of large size.

And they further state that they were present upon the land and made actual examination of the same, as stated hereinbefore.

BUEL H. BARTLETT.
WM. ARNOT.

Be it remembered that on this 13th day of August, A. D. 1874, before me, James F. Gyles, a notary public in and for the city of Chicago, Cook county, Illinois, personally appeared Buel H. Bartlett and William Arnot, who, in their own proper persons, subscribed the foregoing affidavit in my presence, and who were then by me each duly and severally sworn, and they and each of them stated upon their oaths that the foregoing affidavit by them sub-
143 scribed was and is true in substance and in fact.

In witness whereof I have hereunto set my hand and affixed my notarial seal this 13th day of August, A. D. 1874.

JAMES F. GILES,
Notary Public. [SEAL.]

STATE OF ILLINOIS, }
Cook County. }

To the Commissioner of General Land Office, Washington, D. C.:

The undersigned, Franklin A. Cleaveland, states that he is a citizen of the United States and resides in the county of Cook and State of Illinois.

And he further states that he hereby makes application and desires the survey of certain lands belonging to the United States situated in the county of Cook and State of Illinois, which lands lie within the Government meander of Wolf Lake, as shown on the

official plats in township thirty-seven (37), range 15 east of third P. M., and more particularly shown on the diagram hereto annexed.

And he further states that the lands which he now asks and desires a survey of are described as follows when the survey shall have been extended, viz:

The northwest fractional quarter (within Government meander) of the northeast fractional quarter of section thirty-one (31), township thirty-seven north, range fifteen (15) east, 3d P. M.

144 The northeast fractional quarter (within Government meander) of the northeast quarter of section thirty-one (31), township thirty-seven (37) north, range fifteen (15) east, of third P. M., containing 38.5 acres and shown on the accompanying diagram as "Aa;" also the east fractional one-half (within Government meander) of the southeast quarter of section thirty (30), in township thirty-seven (37) north, range fifteen (15) east, of third P. M., shown on said diagram as "Bb," containing 77.96 acres.

Also the fractional west half of the southeast quarter (within Government meander) of section thirty (30), township thirty-seven (37) north, range fifteen east, of third P. M., containing 54.91 acres, and shown on said diagram as "Cc."

And he states that the waters of Wolf Lake have disappeared entirely from the first-mentioned tract of land, marked on said diagram as "Aa," and that the whole area thereof is fit for agricultural purposes, and that the quantity of land capable of being surveyed in said tract above described and marked on said diagram as "Aa" is 38.5 acres.

And he states that the waters of Wolf Lake have disappeared from the second-described tract, marked on said diagram as "Bb," as follows:

The waters have disappeared over the whole tract to such an extent that upon no portion of the same is the water more than two feet in depth and rapidly disappearing.

145 That the whole of said last-named tract is capable of being surveyed now, and the surveyor can survey the same and fix the corners by actual survey of all of said tracts.

That the waters have disappeared entirely from said tract last named, so that 50 acres thereof, lying between the original meandered line and the margin of the waters, is fit for agricultural purposes at present, and — will shortly entirely disappear over the entire tract.

That the waters have disappeared from the tract above described and marked on said diagram as "Cc," so that the whole of the same is capable of being now surveyed and without surveying same on ice; that there is not more than 2½ feet of water on any portion of said tract, so that a surveyor can extend the lines and fix the corners by actual survey at the present time.

That the waters of said Wolf Lake have disappeared from said tract entirely to the extent that 27 acres thereof is fit for agricultural purposes, and the portions so delineated as fit for agricultural purposes are noted and traced on said diagram in each of the re

spective tracts, and which all lies contiguous and adjoining each other.

And he says that said tracts marked "Bb" and "Cc" have together an area of land fit for cultivation and agricultural purposes of 77.8 acres, which, together with the tract marked "Aa," makes an area of land of 116.3 acres.

And he further states that all of the corners of the N. E. ¼, section 31, T. 37, R. 15, have been hereupon established by Govern-
146 ment survey, and that all the corners of the S. E. ¼ section 30 have been established by Government survey except the northeast corner; that the same can now be established and has actually been established by a competent civil engineer and surveyor, whose affidavit is referred to as a part of this statement, and that the depth of the water on said tracts are noted at the points indicated thereon, and referred to as a part of this statement and application for survey.

FRANKLIN CLEAVELAND.

STATE OF ILLINOIS, } ss:
County of Cook, }

Before me, James F. Gyles, a notary public, duly commissioned, in and for the city of Chicago and county of Cook, in the State of Illinois, personally appeared Franklin A. Cleaveland, who subscribed to the foregoing statement in my presence, and, being duly sworn, stated that the same was true in substance and in fact.

In witness whereof I have hereunto set my hand and notarial seal of office this 12th day of August, A. D. 1874.

[SEAL.] JAMES F. GYLES,
Notary Public.

147 STATE OF ILLINOIS, } ss:
Cook County, }

DANIEL B. URRY and WILLIAM ARNOT, of the county of Cook and State of Illinois, first being duly and severally sworn, depose and say that they reside in the county of Cook and State of Illinois, and that they have no interest, directly or indirectly, in the application for survey herewith connected, and have no interest, directly or indirectly, in any claim for pre-emption or otherwise relating to the lands mentioned herein, but are entirely disinterested in the subject-matter of said lands and in the survey of the same; and they further, on their several oaths, state that they are acquainted with the lands hereinafter mentioned, being all within the Government meandered lines of Wolf Lake, and they are acquainted with the present condition of said lands with regard to the fitness thereof for cultivation thereof; and they further, severally, on their oaths state that the waters have disappeared entirely from the fractional northwest quarter of northeast quarter (within Government meander) of section 31, township 37 north, range 15 east, of 3d P. M., and the fractional northeast quarter of the northeast quarter (within Government meandered lines), so that the same is fit for cultivation and

agricultural purposes, and the said tract *is* marked on the diagram as "Aa" contains about thirty-eight acres of land, and that the waters have disappeared from the fractional east half of southeast quarter of section 30, township 37 north, range 15 east, of 3d P. M., so that the entire fractional east half of southeast quarter of
148 section 30 aforesaid can now be surveyed and the corners thereof fixed and determined at the present time.

That no portion of said tract last named which is marked "Bb" on said diagram is covered with water to the depth of more than two (2) feet, and that the waters have so disappeared that there is now within the meandered lines aforesaid and the margin of the water on said tract marked "Bb" fifty acres of land fit for cultivation and agricultural purposes, and such land so fit for cultivation and agricultural purposes is marked and sketched on said diagram "Bb;" and they further state that the greater portion of the tract marked shallow water on said diagram in the tracts marked "Bb" and "Cc" is very shallow, and the average depth they believe would not exceed eighteen inches, and is rapidly disappearing.

And they further say that the waters have disappeared from the tract marked "Cc" on said diagram and described as fractional west half of southeast quarter (within Government meander) of section 30, township 37 north, range 15 east, of the 3d P. M., so that between the original meandered line and the margin of the water there is not less than twenty-five acres of land fit for cultivation and agricultural purposes, and the water on the remaining portion of said tract are very shallow and the same can now be surveyed and the corners thereof established; that on no portion of the same is the water more than two feet deep and is rapidly disappearing, the portions on which shallow water stands on the tracts marked
149 "Bb" and "Cc" (and which contain at least 75 acres of land fit for cultivation at the present time) is indicated with the approximate depth thereof on said diagram; that upon said tracts marked "Aa," "Bb," and "Cc" within Government meandered lines there is at least one hundred and thirteen (113) acres of land fit for cultivation and agricultural purposes and the remainder of said tracts can be surveyed.

And they further state that the annexed plat is a correct representation of the location and situation of said land and of the situation of the waters of said pond or shallow lake, and the lines and figures indicated thereon are correct, from a careful examination of the land and the distances surveyed.

And they further state that all the corners of the N. E. ¼ of section thirty-one (31) have heretofore been established by Government survey, as shown on the diagram, and that three of the corners of the southeast quarter of section (30) thirty have been established heretofore by Government survey, and that the remaining corner, viz., the N. E. corner, of said quarter section is now dry land and has been actually surveyed, and that the diagram is a correct representation of this survey; also all the corners of the N. E. ¼ of section thirty (30) have been established by Government survey except the

S. E. corner, and that is now dry land and has been actually surveyed and the same fixed by a competent civil engineer.

DANIEL B. URRY.
WM. ARNOT.

150 STATE OF ILLINOIS, } ss:
Cook County, }

Before me, a notary public, duly commissioned, in and for the city of Chicago and county of Cook, in the State of Illinois, personally appeared Daniel B. Urry and William Arnot, who each subscribed to the foregoing affidavit in my presence, and who were by me each severally sworn, and upon their said oaths stated that the above and foregoing affidavit by them subscribed was true in substance and fact.

In witness whereof I have hereunto set my hand and notarial seal of office this 12th day of August, A. D. 1874.

[SEAL.] JAMES F. GYLES,
Notary Public.

To the Commissioner of the General Land Office, Washington, D. C.:

The undersigned, Chester B. Rushmore, states that he is a resident of the county of Cook and State of Illinois and a citizen of the United States.

And he states that he hereby makes application for and desires the survey of the frac. northeast quarter of section thirty (30) (within Government meandered lines), and the southeast frac. quarter (within Government meandered lines) of section nineteen (19), and the northeast frac. quarter (within Gov't meandered lines) of section nineteen (19), and the northwest frac. quarter (within Government
151 meandered lines) of section twenty (20), all in township thirty-seven (37) north, range fifteen (15) east, of third P. M., in Cook county, Illinois.

And he states that said tracts of land so within the Government meandered lines are shown upon the diagram herewith submitted and marked "Dd" and "Ee."

And he further states that said land lies within the Government meandered lines of a lake shown upon the official plats of the Government surveys in said town. thirty-seven (37) aforesaid, and that the waters of said lake have so disappeared within the meandered lines upon the tract marked "Dd" that there *is* now about forty acres of dry land fit for agricultural purposes between the original meandered lines and the margin of the water, and that the water that covers the remaining portions is shallow and not to exceed two feet in depth and rapidly disappearing, and that there is between the original meandered lines and the margin of the water in the tract marked "Ee" nearly one hundred acres of land fit for cultivation and agricultural purposes, and the remainder of said tract marked "Ee" is covered with shallow water not exceeding two feet in depth, and in most of the portions thereof not that depth.

That all the tracts comprised in the different fractional sections above mentioned can be surveyed now without difficulty and the

corners thereof established by actual survey and without surveying the same on ice; that all the corners of the northeast frac. quarter of section thirty (30) aforesaid can be established, the south-
152 east corner thereof being now dry land and the northeast corner thereof being in shallow water, and has been established by a competent surveyor.

That the remaining corners of said quarter section lie without the Government meander, and therefore have been established.

That the southeast frac. quarter of nineteen (19) aforesaid can be surveyed now and the area noted and determined and the corners thereof all established; that the southeast corner thereof has been found and established in shallow water and the northeast corner thereof is now dry land, and the remaining corners of said quarter section are outside the Government meander and have already been established.

That the northeast frac. quar. of said sec. nineteen (19) can all be surveyed, being all dry land, as shown on the diagram, and all the corners established to the quarter section.

That the northwest fr. quarter of said section twenty (20) can be surveyed now and the corners established; that the southwest corner thereof is now dry land, and the remaining corners of said quarter section have been heretofore determined by Government survey.

That he refers to the said diagram and the points, &c., fixed thereon and the depth of the water marked thereon, and makes it a part of this his application for such survey.

CHESTER B. RUSHMORE.

153 STATE OF ILLINOIS, }
Cook County. }

This is to certify that on this 18th day of August, A. D. 1874, before me, a notary public in and for the county of Cook and State of Illinois, personally appeared Chester B. Rushmore, who, first being duly sworn, on his oath stated that the foregoing statement by him subscribed in my presence was true in substance and fact.

In witness whereof I have hereunto set my hand and affixed my notarial seal this 18th day of August, 1874.

[SEAL.] JAMES F. GYLES,
Notary Public.

STATE OF ILLINOIS, }
Cook County. }

To the Commissioner of the General Land Office, Washington, D. C.:

The undersigned, George A. Rowe, states that he is a citizen of the United States over the age of twenty-one years *of age*, and resides in the county of Cook and State of Illinois.

And he further states that he hereby makes application for and desires the survey of certain lands belonging to the United States, situated in the county of Cook and State of Illinois, which lands lie within the Government meandered lines of a shallow lake called

Wolf Lake, as shown on the official plats, in township thirty-
154 seven (37) north, range fifteen (15) east, of third P. M., and more particularly shown on the diagram herewith submitted and marked thereon as "Hh."

And he further states that the lands which he now asks and desires a survey of are described as follows:

Fractional section thirty-two (32), (within the Government meandered lines), in township thirty-seven (37) north, range fifteen (15) east, of the third P. M., or will be so described when the survey shall have been extended, and containing now within said meandered lines dry land fit for cultivation and agricultural purposes about fifty (50) acres of land, and that the same is indicated on the diagram herewith and marked thereon as "Hh," the portion that is now dry land within said lines being clearly indicated.

And he further states that the northeast corner of the northwest quarter of section thirty-two (32) aforesaid can be established at the present time by survey and the lines extended to the same; that the same is now in shallow water; that all the rest of the corners of said last-named quarter-section are outside of the Government meandered lines; that the remainder of the northwest fr. quarter of section thirty-two (32) within Gov't meandered lines aforesaid that is not indicated on said plat as dry land is covered with shallow water, and that the same can be easily surveyed at this time and without surveying the same upon ice.

And he further says that he refers to the accompanying diagram and makes it a part of this his application for a survey.

GEORGE A. ROWE.

155 Be it remembered that on this 13th day of August, A. D. 1874, before me, James F. Gyles, a notary public in and for the city of Chicago, county of Cook and State of Illinois, personally appeared George A. Rowe, who in my presence subscribed his name to the foregoing statement, and who was thereupon by me duly sworn, and upon his said oath he stated that the foregoing statement by him subscribed was and is true in substance and fact.

In witness whereof I have hereunto set my hand and notarial seal this 13th day of August, A. D. 1874.

[SEAL.] JAMES F. GYLES,
Notary Public.

STATE OF ILLINOIS, }
Cook County. }

Buell H. Bartlett and Orman Coe, first being duly and severally sworn, depose and say that they have no interest, directly or indirectly, in the application for survey herewith connected, and have no interest, either directly or indirectly, in any claim for pre-emption or otherwise relating to the lands mentioned herein, but are entirely disinterested in the subject-matter of said lands and in the survey of the same.

And they further, on their several oaths, state that they are acquainted with the lands hereinafter mentioned, being all within the

Government meandered lines of a lake called Wolf Lake, and they are acquainted with the present condition of said lands with
156 regard to the fitness thereof for cultivation; and they further state severally on their oaths that the waters have disappeared from the fractional section thirty-two (32), within the Government meandered lines, so that — the tract marked "Hh" in the fractional section aforesaid there is now about fifty (50) acres of land fit for cultivation and agricultural purposes, as shown upon the diagram herewith submitted.

And they further state that the whole of the northwest frac. quarter of section thirty-two (32) within the Government meandered lines as aforesaid can be surveyed and the lines extended by actual survey and not upon ice.

That the portion of the land indicated upon said diagram as N. W. fr. ¼ of section 32 aforesaid indicated as covered by water is now covered by shallow water, and that the northeast corner of the northwest quarter of said section 32 can at the present time be established by a competent surveyor without difficulty, they believe, and the survey thereof be properly extended.

And they refer to the plat and diagram herewith submitted and make it a part of this affidavit for the purpose of showing the situation of said land.

BUEL H. BARTLETT.
ORMAN COE.

157 Be it remembered that on this 13th day of August, A. D. 1874, before me, James F. Gyles, a notary public in and for the city of Chicago, Cook county, Illinois, personally appeared Buel H. Bartlett and Orman Coe, and who each in their own proper person and in my presence subscribed their names to the foregoing affidavit and who were thereupon each duly and severally sworn by me and who each upon their oaths stated that the foregoing affidavit by them subscribed *were* true in substance and fact.

In witness whereof I have hereunto set my hand and notarial seal this 13th day of August, A. D. 1874.

[SEAL.] JAMES F. GYLES,
Notary Public.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Sept. 8th*, 1874.

Alex. Wolcott, Esq., Co. surveyor, Cook Co., Chicago, Illinois.

SIR: Application having been made to this office by Franklin Cleaveland and others, through their attorney, H. O. McDaid, Esq., of Chicago, for the extension of the lines of public surveys
158 over meandered lake, situated in sections 19, 20, 29, 30, 31, and 32, t'p 37 N., R. 15 E., 3d P. M., Illinois, which according to sworn testimony has become reclaimed and the land forming the bed thereof is fit for agricultural purposes, and the sum of eighty dollars has been deposited by the parties interested in the survey for the purpose of covering the expenses of the survey of so much of

said sections as in dry land and admits of the running, measuring, and marking of the lines of public surveys, and the applicants for this survey having submitted your statement of the amount for which you will execute the survey and your name as a proper person for this work, I have consented to appoint you a U. S. deputy surveyor for the execution of the work involved in the premises.

Should you accept the appointment and perform the work for the sum deposited as above you will signify your willingness to this office and proceed to the field to carry out the following instructions, to wit: In the first place, you will identify the meander corners of the original survey of so much of the lake as falls within the State of Illinois, and if the lands along the State boundary are surveyable it will be necessary for you to extend the line between the States of Indiana and Illinois by establishing the proper mile post at a point eighty chains north of the 155th mile corner, which should be identified by you. You will then prolong the lines interrupted by the lake across the same or so far as the dry land admits of the establishment of permanent corner boundaries required by the
159 manual of surveying instructions—copy herewith. You will bear in mind that in order to enable parties to acquire title to the lands thus surveyed it is required that each quarter section should have three corners established and permanently marked and witnessed, as in the absence of them or either of them the land is considered unsurveyed, and consequently no patent for the land thus circumstanced can be issued. In the second place, it will be your duty while extending the lines over the lake from the meandered corners which are in existence or which, if destroyed by time or accident, should be restored to their proper places, to prolong from thence the subdivisional and township lines no farther than you find them forming the necessary limits of lands for quarter sections or full sections and not a chain beyond the point for legal corners, avoiding additional meanders in bounding legal subdivisions, as the areas thereof must be defined by section lines, and any fractions of reclaimed land which do not constitute a technical quarter section must be left out.

In the next place, your aim and duty will be to complete legal subdivisions of the original survey of the adjacent lands so that the regular subdivisions may be maintained in each section, and you will number such fractions by consecutive numbers to those already numbered, as per diagram herewith, and calculate the contents of the same.

In order to enable you to identify the former meander corners as well as the nearest section and quarter-section corners of the
160 contiguous lands, I transmit to you an extract of so much of field-notes of the former surveys as will facilitate your operations in the field, and to this end I send you herewith field books and field-note paper, on the latter of which you will make your returns of survey to this office in proper form, as required in the manual of surveying instructions.

You will also furnish a diagram showing the extent of the reclaimed lands in your survey, and in connection with your returns

will state under your official oath, from such sources of information as may be at your command, whether now or at any former period this body of water is or actually has been used as a highway of commerce or has ever been susceptible of such use. You will also state the average depth of the remaining waters, what class of vessels, if any, are in use on such waters, and whether there is any connection between the said waters and the waters of any other stream or lake known to be navigable, and whether there exists on the shores of the lake to be surveyed by you any landing place or places from which freights or passengers are shipped to other ports or places. With your returns of survey you will transmit your account, including all expenses attending the survey payable out of the fund deposited to the credit of "individual depositors."

You are requested to acknowledge the receipt of these instructions at your earliest convenience.

Very respectfully, S. S. BURDETT,
Commissioner.

161 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March 15th*, 1878.

Hon. C. Schurz, Secretary of the Interior.

SIR: I have the honor to make the following report upon House resolution dated January 29, 1878, calling upon the Department of the Interior for information as to the surveys of the beds of Lakes Wolf and George, in Indiana, and the location of Sioux scrip upon the lands and patenting of said lands.

Those portions of the lakes situated in Indiana fall in t'p. 37 N., R. 9 west, and t'ps 37 and 38 N. of range 10 west of 2d P. M.

The original survey of these townships was made in 1835, when the lakes were meandered, and were reported by the surveyor as impassable marshes or lakes.

That part of Lake Wolf falling in Illinois is marked "navigable lake" upon the official plat of survey.

On the 29th June, 1874, John S. Newman, a citizen of Indianapolis, by his attorney, Theodore Adams, of Washington, D. C., applied to the General Land Office to have the beds of said lakes surveyed in order that the land might be brought into market.

The application was accompanied by the affidavits of Samuel C. Pomeroy and Theodore Adams, of Washington, D. C., that the waters of said lakes had measurably disappeared from the
162 bed of the lakes, and that the land had become fit for agricultural purposes.

On the 7th of August, 1874, instructions were issued to Elisha T. Bennett to survey said lake beds.

On the 7th of September, 1874, Mr. Bennett made return of the survey to the General Land Office.

He had been instructed to survey only such land as was dry and admitted of meandering and marking, and to leave any fractions of such land which did not constitute a technical quarter section.

An examination of his return showed that his survey had been

made by triangulation and by driving posts in the earth through water; that he found the beds of the lakes covered with water from one to six feet deep, except some very narrow margins along the former surveyed land and two small tracts—one in S. W. ¼ of sec. 18 and in N. W. ¼ of sec. 19, and an island of 4 or 5 acres, in sec. 18 of t'p 37 N., R. 9 west.

Said survey was therefore not approved.

On the 12th Dec., 1874, H. O. McDaid, of Chicago, Ill., filed an application for the resurvey of said lake beds for the benefit, as alleged, of certain pre-emptors.

The affidavits accompanying this application were made by John A. Smale, a resident of Lake Co., Indiana; Frank N. Rossiter, civil engineer and surveyor, and John Wormacott, and Henry D. Egger, of same county.

A diagram accompanied this application and was said to
163 illustrate accurately the condition of the lake beds.

The two latter affiants made oath that they were not interested in the survey or disposal of the lands.

From the diagram and affidavits it appeared that about 340 acres of what had been represented as lake was dry prairie and timber land, the remainder, some sixteen hundred acres or more, being represented as covered with shallow water which was disappearing; the water in Lake George being represented as from 6 to 10 inches deep and the lake bed as consisting partly of marshy, sedgy land and wild rice swamps.

Rossiter, the surveyor, made a preliminary survey and states that the timbered tracts bore timber of a large size, and that such timbered land was omitted by mistake or otherwise in the original survey of the adjacent lands.

On the 6th September, 1875, Samuel V. Niles, Esq., submitted additional evidence showing the character of said lake beds and in behalf of ordering a resurvey.

This evidence consisted of a map of the lakes showing the location of pre-emption settlers upon the lands, affidavits of said settlers, viz: John A. Smale, Charles Rose, Euphemia Robinson, and six others testifying that the lands they were upon had been improved and cultivated by them in part.

Photographic views of the settlements and portions of the lake beds accompanying these affidavits and sustain the statements set forth by affiants.

The representations were such that on the 23d of Oct.,
164 1875, a resurvey was ordered by this office, which was made in Nov., 1875, and approved on January 12th, 1876.

On the 20th April, 1876, the resurvey was submitted to the Honorable Secretary of the Interior on appeal from approval of the same, and on February 23, 1877, the Secretary affirmed the action of this office in approving the survey.

A connected diagram of said lake beds is enclosed herewith.

In regard to the law under which said survey and resurvey were made, I have to say that it was done without the authority of a specific law upon the subject.

Section 2401 of the Revised Statutes, page 443, provides for survey under deposits made by settlers in townships which are situated within the regular progress of the public surveys. Section 2219 of the Revised Statutes devolves the duties of surveyors general upon the Commissioner of the General Land Office in districts where the former office has been discontinued.

Enclosed herewith is a circular of instructions issued by my predecessor July 13, 1874, to regulate the practice of this office in such cases.

With regard to the location of the Sioux half-breed scrip upon said lands the records of this office show that on the 31st of March, 1874, eleven pieces of Sioux half-beed scrip, issued under act of July
17, 1854, Statutes at Large, vol. 10, page 304, were filed in
165 the U. S. land office at Indianapolis, Indiana, for unsurveyed
lands constituting the beds of Lakes Wolf and George, in Lake Co., and that on the 8th day of February, 1876, the same were adjusted by the official plat of survey, covering in the aggregate seventeen hundred and thirty-five and twenty-nine hundredths ($1,735\frac{29}{100}$) acres of land.

These locations were made pursuant to said act and the instructions of this office issued thereunder.

Copies of official circulars of instructions regulating the location of said scrip are herewith enclosed.

In reply to that part of the resolution for information as to whether any of said lands have been patented, I have to state that a majority of the locations of the Sioux half-breed scrip have been patented.

Two patents also have been issued for additional homestead entries under the 2nd section of the act of June 8, 1872. (U. S. Statutes, vol. 17, page 605.)

In regard to the grant to the State of Indiana of swamp and overflowed lands by the act of Sept. 28, 1850, and the subsequent patent to said State of certain sections and fractional sections in township 37 north, ranges 9 and 10 west, and t'p 38 N., R. 10 W., as recited in the preamble to said House resolution, I have to state that the patent referred to, conveying to the State of Indiana certain sections and fractional sections of swamp lands, specifically mentions the number of acres so conveyed in each township, and describes the
same as "according to the official plats of survey," the area
166 conveyed agreeing with that outside the original meandered
line of said lakes in the tracts conveyed.

Furthermore, said grant of Sept. 28, 1850, has always been held by this office not to include such tracts as at the date of the grant were "shallow lakes" and covered by water at all times of the year. This ruling has been sustained by the Department. It was done by the decision of the Secretary of the Interior August 28, 1856, in the case of Florida swamp selections.

The resolution of the House of Representatives is herewith returned.

I have the honor to be, very respectfully, your ob'd't servant,

J. A. WILLIAMSON,
Commissioner.

167 And thereupon defendant offered in evidence certified transcript of the decision of the Commissioner of the General Land Office in the matter of the claim of the Illinois Central Railroad Company, the State of Illinois, the county of Cook, Gertrude Hardin, and others, dated Feb. 12, 1878, and the decisions of the Secretary of the Interior upon the appeal of said Hardin *et al.* in said matter of said Commissioner's decision, dated May 4, 1880; August 24, 1880; May 16, 1881, and April 23, 1881, said several decisions, so far as material to this case, being as follows, viz:

168 Decision of the Commissioner of the General Land Office in the matter of the claims of the Illinois Central Railroad Company, the State of Illinois, the county of Cook, Gertrude Hardin, Horatio B. De Witt, and sundry other persons for lands in township 37 north, range 15 east, Illinois, known as the bed of Wolf Lake.

168*a* Decision of the Commissioner of the General Land Office in the matter of the claims of the Illinois Central Railroad Company, the State of Illinois, the county of Cook, Gertrude Hardin, Horatio B. De Witt, and sundry other persons for lands in township 37 north, range 15 east, Illinois, known as the bed of Wolf Lake.

168*b* DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *February* 12, 1878.

GENTLEMEN: I have considered the claims of the Illinois Central Railroad Company, the State of Illinois, by herself and by Cook county as her grantee, and sundry persons for lands lying in sections 19, 20, 29, 30, 31, and 32, township 37 north, range 15 east, third principal meridian, Illinois.

These lands constitute the bed of what is known as Wolf Lake, in Cook county, Illinois, shown by the survey of the township in 1835 as a navigable lake.

The plat of that survey was undoubtedly filed in the district land office prior to June, 1836, entries of land thereunder having been made at that time.

The waters having receded or evaporated, application for the survey of the body of land so brought into existence was made under circular issued from this office July 13, 1874. Survey was thereupon made and approved December 31, 1874. On 9th of January, 1875, copy of the plat of this survey was sent to the district officers at Springfield, with instructions to notify all claimants for the lands of a day set for hearing testimony regarding such claims, and after such hearing to transmit all the proceedings, with their joint opinion thereon, to this office.

Pursuant to such instructions hearing was held on February 8, 1875, and succeeding days, the proceedings, however, being considered as of date of February 8, and the following claims, with testimony, were presented for consideration:

The Illinois Central Railroad Company claims, as grantee of the

State, the lands in controversy in sections 20, 30, and 32 under the act of Congress approved September 20, 1850, granting lands to the State of Illinois to aid in the construction of a railroad from Chicago to Mobile (9 Statutes, 466). These sections are within the six-mile limits of that grant, as are also, in fact, all the lands in dispute.

The State of Illinois claims for herself the lands in sections 20, 30, and 32 under the "swamp lands" grant of September 28, 1850 (9 Statutes, 519). This claim was not set up at the hearing, but has been asserted since. As it is of the same nature as the ensuing claim, it is considered in order that all known claims to the land may be passed upon.

168c The county of Cook claims, as grantee of the State, the lands in sections 19, 29, and 31 under the swamp lands act of September 28, 1850.

Gertrude Hardin claims the land in sections 19 and 30 and parts of 20 and 29, and Horatio B. De Witt claims the southwest fractional quarter of section 20, both of these claims being based upon riparian ownership.

On transmitting the claims and testimony the district officers at Springfield forwarded their joint opinion thereon, adverse to the claims of the Illinois Central Railroad Company, the county of Cook, as grantee of the State, the riparian claimants; the Sioux half-breed and Porterfield scrip claimants, and in favor of certain of the pre-emption and homestead claimants.

The first claim for consideration is that of the Illinois Central Railroad Company under the act of Congress approved September 20, 1850. (9 Statutes, 466.)

By that act there was granted to the State of Illinois, to aid in the construction of a railroad from Chicago to Mobile, every alternate section of land, designated by even numbers, for six sections in width on each side of the said road and its branches. This grant was transferred to the company by an act of the Legislature of the State.

Lands within the limits of the grant were withdrawn by telegram from this office September 19, 1850, followed by letters of September 20, 1850. Lands supposed to be not needed for the satisfaction of the grant were restored in 1852. The grant was adjusted in May, 1858, since which certain tracts, approved to the State in the adjustment, were found to have been disposed of prior to the grant and so noted on the margin of the approved lists as follows:

Within the six-mile limits	200 acres.
Within the fifteen-mile limits	840 acres.
Total	1,040 acres.

showing that the railroad company has failed to this extent in receiving the quantity awarded in adjustment.

The grant has been treated by the Department and the courts as fully adjusted, and I think this of itself is a sufficient bar to the claim. If, however, the company has any right to the lands it is by virtue of the original grant of even-numbered sections within

six-mile limits, and not as indemnity for lands lost by failure of title to those embraced in the adjustment.

"There be, and is hereby, granted" are the words of the 168*d* act. The Supreme Court of the United States, in the case of The Leavenworth, Lawrence and Galveston Railroad *vs.* The United States (2 Otto, 741), say, in regard to the grant then under consideration, the language being precisely similar, that "it creates an immediate interest and does not indicate a purpose to give in future. 'There be, and is hereby, granted' are words of absolute donation and import a grant *in præsenti*. This court has held that they can have no other meaning, and the Land Department, on this interpretation of them, has uniformly administered every previous similar grant. Railroad Company *vs.* Smith, 9 Wallace, 95; Schulenberg *vs.* Harriman, 21 *idem*, 60; 1 Lester, 513; 8 Opinions, 257; 11 *idem*, 47." The act of September 20, 1850, therefore, passed a present interest and conveyed only land which then existed in the even-numbered sections within the six-mile limits. The question involved, consequently, is whether the land claimed was in existence at the date of the grant.

Meanders of what was termed a navigable lake, covering the lands in controversy, were surveyed in 1834 and 1835, and by the plat constructed from that survey this office has so far been governed in disposing of the lands in the township. The first evidence presented to this office of the existence of land within the limits of this meandered lake is found in the affidavits of Franklin A. Cleveland, George A. Rowe, Chester B. Rushmore, and Alice A. Condit, presented by H. O. McDaid, of Chicago, as attorney, with application dated August 19, 1874, for a survey of "Wolf Lake" bed. There is, however, testimony in connection with the claim under the "swamp lands" grant showing that this land was to a great extent covered with water so late as 1850, the tenor of all the evidence being to the effect that the greater part, if not all, of it came into existence some time subsequent to 1850 and prior to the survey in 1874 as a "lake bed" from which, by evaporation or other causes, natural or artificial, the waters had permanently receded, leaving within the unsurveyed area dry land, fit, in ordinary seasons, for agricultural purposes. On receipt of the application referred to survey was made by direction of this office and approved as that of the bed of a lake covered with navigable water at the time of the original survey, segregated from the surveyed public lands by the meandered lines of that survey, and consequently excluded from the operation of laws granting or providing for the disposal of public lands while so designated a body of navigable water and as lands which had come into existence subsequent to the original survey of the lake and adjacent lands.

Although it is possible that at the date the railroad grant became effective there was between the actual borders of the lake and its borders, as laid down on the survey of 1835, a small strip of land, and although the evidence goes to show that, notwithstanding the survey of 1835 treats the body of water as a whole, with no division between what are now called Wolf and Hyde Lakes, there was in 1850

a strip of timbered land running from the border of the lake,
168e in section 20, southwestwardly to its border, in section 29, thus dividing it into two parts, the testimony as to the width of this strip in 1850 is so conflicting that it is not practicable to determine, even approximately, its area in section 20; and as the existence of sufficient portion of land or swamp to bring any subdivision within the denomination of "swamp land" in 1850 has not been established I have preferred, inasmuch as the area of land in section 20 in 1850 would be very small, if the utmost claimed were allowed, to consider the failure to establish the swampy character of the land in 1850 as a failure to show that the plat of the survey of 1835 did not correctly represent the boundaries of the land in 1850.

It being held that the land was not in existence at the date of the grant under which the Illinois Central Railroad Company claims, it is also held, under the decision of the Supreme Court before referred to, that the grant did not attach to it on its subsequent formation or appearance, and the claim of the company is therefore rejected.

The claims of the State of Illinois, for herself and the county of Cook as grantee of the State, under the swamp lands act of September 28, 1850 (9 Statutes, 519), embrace all the lands in controversy.

These claims are rejected for two reasons: First, because of failure to establish the swampy character of the land in 1850, this office having uniformly held that the "swamp lands" grant was a grant *in præsenti*, and that lands to pass thereunder must have been "swamp" at the date of the grant, not subsequently brought into that condition by the recession of waters covering the same; and, second, because so long ago as November 20, 1855, the honorable Secretary of the Interior decided that the State of Illinois was not entitled to swamp lands under the grant of September 28, 1850, in either odd or even numbered sections, within the six-mile limits of the railroad grant by the act of September 20, 1850. (1 Lester, page 523.)

The riparian claims of Gertrude Hardin and Horatio B. De Witt have been denied by the action of this office in ordering and approving the survey of the lake bed, thus treating the land as belonging to the United States.

168f The claims under the pre-emption and homestead laws remain for consideration.

Lot 1 of the northeast quarter and lots 2 and 3 of the southeast quarter, section 19, in connection with lot 3 of northwest quarter, section 20, are claimed by Andrew Farrand under the pre-emption laws; declaratory statement dated January 20, 1875, alleging settlement April 24, 1874.

Lot 1 of northeast quarter, section 19, with west fractional half southwest quarter, section 29, claimed by John E. Curtis; additional homestead application dated January 14, 1875.

East fractional southeast quarter, section 19, claimed by Wright Allen; additional homestead application dated January 14, 1875.

168*g* Lot 1, northeast quarter section 19, with lots 3 and 4, southeast quarter section 29, claimed by Samuel Davis; additional homestead application dated January 14, 1875.

Southeast fractional quarter northeast fractional quarter section 19, with southeast fractional quarter and south fractional quarter northwest quarter section 20, claimed by James Brown *alias* James Washington; additional homestead application dated January 14, 1875.

West half southwest quarter and south half of east half of southwest quarter, with lot 2 of southwest quarter, section 20, claimed by Alice A. Condit; pre-emption declaratory statement dated February 1, 1875, alleging settlement August 23, 1873.

East fractional half southwest quarter, being lot 2, and southeast quarter southwest quarter, section 20, claimed by Randolph Crowley; additional homestead application dated January 14, 1875.

West half southwest quarter section 20, claimed by Robert Price; additional homestead application dated January 14, 1875.

Southwest quarter section 20, claimed by Orrin L. Mann; homestead declaratory statement dated January 8, 1875.

South fractional quarter southeast quarter section 20, with northeast fractional quarter section 29, claimed by Jabez G. Smale; homestead declaratory statement dated January 14, 1875; homestead application dated July 12, 1875, covering lot 1, southeast quarter section 20, and lots 1 and 2, northeast quarter section 29.

South half northwest quarter and north half southwest quarter section 29, claimed by Solomon Field; pre-emption declaratory statement dated February 1, 1875, alleging settlement June 27, 1874.

Northwest quarter section 29, claimed by Lyman D. McDaid; homestead declaratory statement dated January 14, 1875; homestead application same date.

North half southwest fractional quarter and north half southeast fractional quarter section 29, claimed by Syrena McDaid; homestead declaratory statement dated January 14, 1875.

West half northwest quarter section 29, claimed by Thomas C. Wilkerson; additional homestead application dated January 14, 1875.

East half southwest quarter section 29, claimed by James W. Smith; additional homestead application dated January 14, 1875.

East half northwest quarter section 29, claimed by John White; additional homestead application dated January 14, 1875.

Northeast quarter (lots 1 and 2) section 29, with north fractional northeast quarter (lot 1) section 31, claimed by Dorcas Matlock; additional homestead application dated January 14, 1875.

Fractional southwest quarter section 29, claimed by Thomas S. Mather; homestead declaratory statement dated January 14, 1875; homestead application June 1, 1875.

168*h* Lot 3, southeast quarter and northeast quarter southeast quarter section 30, with lot 1, northeast quarter section 31, claimed by Franklin A. Cleveland; pre-emption declaratory statement dated January 15, 1875, alleging settlement June 3, 1874; amended April 13, 1875, to cover above-named tracts.

East half northeast quarter, and lot 1, northeast quarter section 30, claimed by Chester B. Rushmore; pre-emption declaratory statement dated January 20, 1875, alleging settlement April 15, 1874; amended April 13, 1875, to cover above-named tracts.

Lot 2, southeast quarter section 30, claimed by George Hawks; homestead declaratory statement dated April 30, 1875.

Lots 2 and 3, southeast quarter and northeast quarter southeast quarter section 30, claimed by Joseph Könyvesy; informal claim under the pre-emption laws, alleging settlement in January, 1868.

Southeast quarter section 30, claimed by Charles Carpenter; homestead declaratory statement dated January 8, 1875.

Lot 2, southeast quarter, and lot 1, northeast quarter section 30, claimed by John Medlock; additional homestead application dated January 14, 1875.

East half northeast quarter section 30, claimed by Robert H. Cummings; additional homestead application dated January 14, 1875.

East fractional half southeast quarter section 30, claimed by James Washington; additional homestead application dated January 14, 1875.

North half northeast quarter section 31, claimed by Anna E. Rees; informal claim under the pre-emption laws dated April 13, 1875, and alleging settlement in 1868 or 1869.

North fraction of northwest quarter, fractional northeast quarter, and north fraction of southeast quarter section 32, claimed by Peter Munhoven; homestead declaratory statement dated January 14, 1875; homestead application same date.

Lots 1 and 2 of northeast quarter and lot 3 of northwest quarter section 32, claimed by William Brewer; additional homestead application dated January 14, 1875.

North fractional half section 32, claimed by Charles E. Rees; informal claim under the pre-emption laws dated April 12, 1875, and alleging settlement in 1853.

In addition to these I find among the papers in the case various affidavits setting up the following claims: Ellis Bennett, for north half of southwest quarter of section 20 and south part of northwest quarter of section 20; Charles L. King, for southwest quarter of section 29, and John Collins, for southeast quarter of section 20. Apparently no attempt was made by these parties to properly initiate their claims, and they are now merely mentioned to show their consideration so far as they are deserving thereof.

It has been suggested that the land in question is not subject to disposal under the pre-emption and homestead laws, because of its being embraced within the corporate limits of the town of Hyde Park.

168*i* While it may be doubted whether an act of incorporation can confer upon a municipal government authority over land not in legal existence as such at the time of the incorporation, the discussion of such a question would be purely speculative at this time. The town has never filed any map of its corporate limits or done any act under law looking toward setting up a claim either for the land or for its exception from the operation of the pre-emption

laws, and I think is precluded from so doing by the act of March 3, 1877, the incorporated town covering an area many times greater than the quantity of land to which it would be entitled under the town-site laws, and the land in question being some miles from the populated portion of the town, not settled upon, inhabited, improved, or used for business or municipal purposes by the town. Such being the case, I do not think the objection carries weight, and therefore pass it by without further consideration.

Andrew Farrand's pre-emption claim for lot 1 of northeast quarter and lots 2 and 3 of southeast quarter, section 19, with lot 3 of northwest quarter, section 20, conflicts with the additional homestead applications of John E. Curtis, Wright Allen, Samuel Davis, and James Brown, *alias* James Washington. The additional homestead applications were received January 14, 1875. Farrand's declaratory statement was filed at the hearing February 8, alleging settlement April 24, 1874.

The testimony in Farrand's behalf shows that he settled as alleged and erected a comfortable house by June, 1874; cultivated during the year about an acre, raising melons, cabbages, &c.; fenced in the cultivated ground; erected out-buildings, which, with the house, are worth three or four hundred dollars, and cut thirty or forty tons of hay.

No evidence in contradiction was submitted, though the witnesses were cross-examined by the attorneys for the State and the scrip claimants.

I therefore conclude that the rights of Farrand are paramount to those of the other claimants, and that his filing should be received.

Alice A. Condit's pre-emption claim for west half, with south half of east half and lot 2 of southwest quarter (being the fractional southwest quarter) of section 20, conflicts with the homestead declaratory statement of Orrin L. Mann, and the additional homestead applications of Randolph Crowley and Robert Price. Mann's homestead declaratory statement offered January 15; Crowley's and Price's applications filed January 14, 1875; Mrs. Condit's declaratory statement offered at hearing.

It is shown that Mrs. Condit's husband went on the land in the summer or autumn of 1872 and built a house, but died in March, 1873, without having occupied the same; that in August, 1873, Mrs. C., with her two children, moved into the house, all remaining there for a short time, when finding she could not obtain schooling for the children without going to Englewood, she went thither with them, leaving her goods, &c., in the house. During her stay on the
168*j* land she did some planting, seeds, &c., and made what improvements she could. After her removal to Englewood she returned at different times to look after her claim, and her elder son usually went to the house on Saturdays, remaining until Monday in occupation and possession. In the latter part of December, on his usual weekly visit, he found part of the household articles had been removed and the door of the house taken away. He immediately informed his mother, who at once procured more goods and articles to repair the damages with, and proceeded to the house for that pur-

pose. While so engaged, on 23d December, 1873, one Ellis Bennett and others forcibly dispossessed her, tore down the house, and burned the material. In the spring of 1874, when she again attempted to return, Bennett a second time drove her away, treating her violently, so that she was afraid to again attempt to resume her occupation of the land. She instituted suit against him for forcible entry and detainer, which was decided in her favor, and from which appeal was taken by Bennett. From September, 1874, until the hearing she was sick and unable to avail herself of the decision in her favor by again taking up her residence on the land.

As before stated, the papers in the case contain affidavits setting up the claims of Ellis Bennett and John Collins, covering this land and lot 3, but I find nothing therein tending to invalidate Mrs. Condit's claim or that of Farrand for lot 3. Bennett admits that he actually abandoned on account of Mrs. Condit's superior right and on promise of immunity from prosecution for his acts. Their claims were not presented at the hearing and do not appear to merit consideration.

I think the evidence sufficiently establishes the good faith and necessary acts of Mrs. Condit, and that therefore her claim is superior. If this be the final decision her declaratory statement will be received.

Lot 1 of southeast quarter, section 20, is claimed by James Brown, *alias* Washington, as an additional homestead, and by Jabez G. Smale, in connection with lots 1 and 2 of northeast quarter section 29, as a soldier's homestead.

Although the register and receiver in their report treat these claims as if filed simultaneously, I find that Brown-Washington's application is endorsed as having been received at 9 o'clock a. m., January 14, and Smale's declaratory statement as received at 9.35 a. m., same day. Brown-Washington's application being first received, I think he is entitled to the land.

The homestead declaratory statement of Jabez G. Smale for lots 1 and 2 of northeast quarter section 29 (in connection with lot 1, southeast quarter section 20) is in conflict with the additional homestead application of Dorcas Matlock, covering the same land; Smale's homestead declaratory statement, filed at 9.35 a. m., and Mrs. Matlock's additional homestead application, filed at 9 a. m. January 14, 1875.

Smale's claim for land in section 20 has already been passed upon.

168*k* Notwithstanding the application of Mrs. Matlock appears to have been first presented, it is not accompanied by proof or *prima facie* showing of her right to land under the additional homestead law, and an examination of the papers in the entry of Cass Matlock, whose widow she claims to be, shows that no mention of military service was made therein. Smale presented *prima facie* evidence of military service, and followed up his homestead declaration by filing homestead application for the land July 12, 1875; but that application is defective, because, although the affidavit is taken before the clerk of the circuit court, it does not show that

Smale was actually residing upon the land, in which event only could the affidavit have been made before such officer.

Neither party alleges settlement; both claims as presented are imperfect, and therefore I think the time of filing should govern in deciding between the parties. For that reason I think the claim of Mrs. Matlock should be considered superior if she can furnish the necessary proof of her right to make additional entry.

Solomon Field claims the south half northwest quarter and north half southwest quarter section 29 under the pre-emption laws. Declaratory statement, dated February 1, 1875, alleging settlement June 27, 1874. This claim is in conflict with the homestead application of L. D. McDaid, the homestead declaratory statement of Syrena McDaid, the homestead declaratory statement of Thomas S. Mather, and the additional homestead applications of T. C. Wilkerson, John White, John E. Curtis, and J. W. Smith, all filed January 14, 1875. Affidavits have also been filed by C. L. King, alleging his claim for the entire southwest quarter, but, for the reasons heretofore stated in the cases of Bennett and Collins, such claim cannot be considered.

The testimony shows that Field went upon the land June 23, 1874, and after examination determined to pre-empt it. On 27th June he commenced erecting a substantial house and dug a well; was ordered by Ellis Bennett to desist, but continued, and by night had the frame-work of the house partially set up. During the night he was arrested at the instance of Bennett and taken to Hyde Park, but, no one appearing against him, was released after a day or two of imprisonment. Returning to the land he found it, with his improvements and material, in possession of King, who claimed under Bennett; demanded possession, which was refused; instituted suit against Bennett and King, which appears to have been decided against him by the justice of the peace, from whose decision he appealed, which appeal was pending at the time of hearing.

Much of the testimony was directed to the question of Field's competency as a pre-emptor, but it fails to show his want of qualifications. Its whole tenor shows his good faith and performance of the necessary legal acts to obtain possession of the land after he had been forcibly dispossessed. I think his rights are fully shown, and that as against the other claimants his filing should be received.

Lyman D. McDaid's homestead application, already partially passed upon, also covers the north half of the northwest quar-
168⅞ ter section 29, for which it is in conflict with the additional homestead applications of Thomas C. Wilkerson and John White. McDaid's application was received at 9.35 a. m. and the others at 9 a. m., January 14, 1875.

The testimony in McDaid's behalf shows that immediately upon the completion of the survey, September 29, 1874, he went upon the land and commenced the erection of a house, which had been prepared for that purpose pending the survey. While so engaged Bennett and King came and drove him and his helpers away. From that date until the filing of his homestead declaratory statement and application he does not appear to have done anything to repossess

himself of the land or assert any right thereto, and his affidavit, though executed before the clerk of the circuit court, does not allege his residence upon the land. I cannot therefore consider his equities as any greater than those of the additional homestead claimants, and as their applications were filed first I think they are entitled to the benefits of their promptitude. Wilkerson's application should be received, so far as it relates to the northwest quarter of the northwest quarter, as also should White's application, in so far as it embraces the northeast quarter of the northwest quarter.

The additional homestead application of Samuel Davis, already partially disallowed, also embraces lots 3 and 4, in the southeast quarter section 29, which claim is in conflict with the homestead declaratory statement of Syrena McDaid. Davis' application was filed at 9 a. m. and McDaid's declaratory statement at 9.35 a. m., January 14.

Davis' application being first in point of time is first in point of right, and his claim is strengthened by the fact that McDaid has not attempted to follow up his declaratory statement by making homestead application, although more than three years have elapsed. If Davis can furnish proof of military service, which is now wanting, his application, so far as it relates to these lots, should be received.

Thomas S. Mather claims, in his homestead declaratory statement of January 14 and homestead application of June 1, 1875, the fractional southwest quarter of section 29. So much of this claim as embraces the north half of the southwest quarter has already been passed upon and rejected in considering the claim of Solomon Field, leaving the southeast quarter of the southwest quarter and lot 5 for consideration. It conflicts in regard to these tracts with the additional homestead applications of John E. Curtis and James W. Smith.

His homestead declaratory statement was filed at 9.30 a. m., their applications at 9 a. m. No settlement is alleged by any of them; therefore the first in time is first in right. In this respect Curtis and Smith are prior to Mather, and Curtis' application, so far as it covers lot 5, should be received, as also should the application of Smith, so far as it embraces the southeast quarter of southwest quarter.

Chester B. Rushmore claims under the pre-emption laws the east half and lot 1 of northeast quarter section 30. Declaratory
168*m* statement offered at hearing and amended to cover tracts. Settlement alleged April 15, 1874.

This claim is in conflict with the additional homestead applications of R. H. Cummings and John O. Medlock.

The testimony shows that Rushmore settled as claimed; erected a substantial house and outhouses; cultivated about half an acre, and resided on the land continuously until the hearing. His settlement and acts appear to have been *bona fide*, and of such a character as to constitute compliance with the requirements of the pre-emption laws. His rights, as against the other claimants, are paramount, and his filing should be received.

Franklin A. Cleveland's pre-emption claim covers the northeast quarter southeast quarter, and lot 3 of southeast quarter, section 30, with lot 1 of northeast quarter section 31. Declaratory statement filed and amended at hearing, settlement being alleged June 3, 1874.

This claim is in conflict with homestead declaratory statement of Charles Carpenter and additional homestead applications of James Washington and Dorcas Matlock. It is also in conflict with the informal claims of Joseph Könyvesy and Anna E. Rees, neither of which have been presented in proper manner or followed up, and which, therefore, do not merit consideration.

It may be questioned whether what Cleveland did prior to June 22, 1874, would enable him to properly claim settlement on June 3; but the evidence proves that on June 22, 1874, he commenced the erection of a house on the land; that while so engaged, on 25th June, parties tore down the house, destroyed the material, and drove him away; that he returned on 26th, and, on being refused possession, had the parties arrested. Then, on 18th August, he commenced the erection of a house 13 by 18, with wing, into which, when finished, he moved with his family, residing therein since. He had dug a well, built outhouses and barn, fenced and cultivated about an acre, mowed hay, &c., up to the time of hearing.

I think he is clearly within the requirements of the pre-emption laws, and that his rights are superior to those of the other claimants. So holding, his declaratory statement should be accepted.

George Hawks claims lot 2 of southeast quarter section 30. Homestead declaratory statement dated April 30, 1875, indorsed as received May 3, 1875.

This claim is in conflict with homestead declaratory statement of Charles Carpenter, received January 15, 1875; additional homestead application of John O. Medlock, received at 9 a. m., January 14, and the informal claim of Joseph Könyvesy, heretofore alluded to, and which cannot be considered.

None of the remaining parties allege settlement, and, as between them, the rights of Medlock are superior, his application having been filed first. So much of it, therefore, as covers this tract should be accepted.

168*n* Peter Munhoven claims the northeast fraction (lots 1, 2, and 3) lots 1, 2 and 3, section 32. Homestead declaratory statement filed January 14, 1875, at 9.35 a. m.; homestead application same date.

This claim conflicts with additional homestead application of William Brewer, filed at 9 a. m., January 14, and with an informal claim of Charles E. Rees, which, not being properly presented, cannot be considered.

In Munhoven's behalf it is alleged that he went on the land September 8, 1874, built a house, and has since resided therein.

Mr. Cleveland, who testifies in the case, says Munhoven settled as alleged; that a house was built by him and others in September, 1874, in which he had resided up to time of hearing, but which house was built of material purchased by himself (Cleveland) with

money furnished for the purpose by Mr. McDaid. No evidence of cultivation or improvement was offered.

In reporting upon this claim the district officers say they are satisfied from the evidence that any improvements made in this case cannot be considered of such a nature as to give Munhoven any priority thereby. In this opinion I concur, and decide that as neither has rights superior to the other, in equity Brewer has the better legal claim for the land, and his additional homestead application should be received.

After rendering an opinion upon all the claims involved in the case, the district officers add a note stating that parties representing Thomas C. Wilkerson, John White, James Brown, Dorcas Matlock, and William Brewer, additional homestead applicants; Edward Hudson and John V. Dumerce, Sioux half-breed scrip claimants, and Charles D. Gilmore, Porterfield scrip claimant, have made application to withdraw parts of their claims.

I find no such application among the papers in the case. All the Porterfield scrip in the case was withdrawn by direct application to this office, but the Sioux half-breed scrip has not been. On the contrary, an application made for its withdrawal was revoked.

Inasmuch as the papers do not show the authorization of any one to act in behalf of the additional homestead claimants, and no application by them or for them for withdrawal of their claims is found among the original papers, or has been made to this office, I cannot consider the statement of the register and receiver as embodying a proper application for that purpose, and have therefore passed upon the claims as presented.

Recapitulating my conclusions in the case, they are:

1. The claim of the Illinois Central Railroad Company, under the granting act of September 20, 1850, for the land in sections 20, 30, and 32 should be rejected.

2. The claims of the State of Illinois and Cook county, under the swamp lands grant of September 28, 1850, for the lands in controversy, should be rejected.

168*o* 3. The claims of Gertrude Hardin and Horatio B. De Witt, under laws relating to riparian rights, for lands in sections 19, 20, 29, and 30, have been rejected by the action of the Department in ordering and approving survey of the land.

4. The various locations of Sioux half-breed scrip, as enumerated and described, should be canceled (and they are now held for cancellation) and the attempted locations rejected.

5. The pre-emption claim of Andrew Farrand for lot 1 of northeast quarter and lots 2 and 3 of southeast quarter, section 19, together with lot 3 of northwest quarter, section 20, should be allowed.

6. The pre-emption claim of Alice A. Condit for west half southwest quarter, south half of east half, and lot 2 of southwest quarter, being in all the fractional southwest quarter, section 20, should be allowed.

7. The additional homestead claim of James Brown, *alias* James Washington, in so far as it embodies the southeast fractional quarter or lot 1 of section 20, should be allowed.

8. The additional homestead application of Dorcas Matlock, in so far as it embraces the fractional northeast quarter (lots 1 and 2), section 29, should be allowed if she presents proof of her husband's military service.

9. The pre-emption claim of Solomon Field for the south half northwest quarter, and north half southwest quarter, section 29, should be allowed.

10. The additional homestead application of Thomas C. Wilkerson, in so far as it embraces the northwest quarter of the northwest quarter, section 29, should be allowed.

11. The additional homestead application of John White, in so far as it embraces the northeast quarter of the northwest quarter, section 29, should be allowed.

12. The additional homestead application of Samuel Davis, in so far as it embraces lots 3 and 4 of the fractional southeast quarter, section 29, should be allowed if he presents proof of military service.

13. The additional homestead application of John E. Curtis, in so far as it embraces the fractional southwest quarter of the southwest quarter, or lot 5, section 29, should be allowed.

14. The additional homestead application of James W. Smith, in so far as it embraces the southeast quarter of the southwest quarter, section 29, should be allowed.

15. The pre-emption claim of Chester B. Rushmore for the east half, and lot 1 of the northeast quarter, section 30, should be allowed.

16. The pre-emption claim of Franklin A. Cleveland for the northeast quarter of the southeast quarter, and lot 3 of southeast quarter, section 30, together with lot 1 of the northeast quarter, section 31, should be allowed.

17. The additional homestead application of John O. Medlock, so far as it embraces lot 2 of the southeast quarter, section 30, should be allowed.

18. The additional homestead application of William
168*p* Brewer, for lots 1 and 2 of the northeast quarter, and lot 3 of the northwest quarter, section 32, should be allowed.

19. All other claims and parts of claims under the pre-emption and homestead laws should be rejected.

Should this decision become final, the declaratory statements of the pre-emption claimants whose claims are allowed will be received as of dates tendered, and on showing proper compliance with law such claimants will be permitted to make entry of the land embraced in their filings.

The additional homestead applications, as allowed, will also, in the event of this decision becoming final, be received as of dates tendered, and certificates will issue thereon on payment of proper fees and commissions.

In the cases of John E. Curtis and Dorcas Matlock, however, proof of military service will be required before issue of certificates.

Sixty days will be allowed for appeal from this decision to the honorable Secretary of the Interior.

Respectfully, J. A. WILLIAMSON,
Commissioner.

To Messrs. C. H. Willett & C. H. Wood, Bennett, Kretzinger & Veeder, H. O. McDaid, John R. Lewis, Isaac R. Hitt, and J. N. Hardin, Chicago, Illinois; Curtis & Earle, C. D. Gilmore, A. A. Hosmer, and S. V. Niles, Washington, D. C.; William Prescott, Springfield, Illinois, and J. A. Crawley, La Porte, Indiana.

169 F. DEPARTMENT OF THE INTERIOR, T. R. B.
GENERAL LAND OFFICE, J. D. L.
WASHINGTON, D. C., *Nov'r* 25, 188–.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of the decision of the Secretary of the Interior of May 4, 1880, in the matter of the claims to certain lands lying within the bed of Wolf Lake, in town. 37 N., range 15 E., 3rd P. M., Illinois, is a true and literal exemplification from the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] N. C. McFARLAND,
Commissioner of General Land Office.

170 DEPARTMENT OF THE INTERIOR,
WASHINGTON, *May* 4, 1880.

SIR: I have considered the appeals of J. Peter Munhoven *et al.* from your decision of February 12, 1878, involving certain tracts of land in what is known as the bed of Wolf Lake, in township 37 north, range 15 E., of the 3rd principal meridian, Illinois.

A survey made in 1834 and 1835 represented a portion of the township embracing said tracts as a part of a navigable lake.

The waters of the lake having from some cause permanently receded, leaving within the unsurveyed area dry land fit for agricultural purposes, an application, dated August 19, 1874, based upon affidavits, was made to your office for a survey under circulation of July 13, 1874 (Copp's L. L., p. 765). Upon this application a survey was ordered, which was duly executed and approved by your predecessor December 31, 1874, copy of the plat of which was soon after filed in the local office at Springfield.

Since the approval the tracts thus surveyed have been recognized and treated as public land and claims have been initiated thereto in the usual manner under general laws, your decision upon
171 the claims of the States of Illinois, the Illinois Central Railroad Company, and divers other parties who have not appealed is considered as conclusive, and those cases only in which appeals were filed will be considered. The tracts surveyed in 1834–'5 were disposed of long prior to the survey of 1874, and owners

of tracts that abutted upon the meanders of the lake under the old survey now claim the newly surveyed tracts as riparian owners.

The parties thus claiming are H. B. Dewitt and Gertrude Hardin, both of whom have appealed. You reject their claims on the ground that they "have been denied by the action of your office in ordering and approving the survey of the lake bed, thus treating the land as belonging to the United States." It seems to me that no other decision can consistently be reached. To recognize riparian rights to these tracts would be equivalent to saying that the lands do not belong to the United States, and that the survey was a nullity. It is now too late for this Department to question the legality of the survey. It is an accomplished fact. It was ordered, begun, and fully executed under a former administration. Parties claiming the land under laws of the United States have proceeded with regard to their claims, relying upon its regularity and legality, and they should be heard by this Department and have their claims disposed of as in other similar cases of claims to public land. Your predecessor decided to order the survey upon consideration of the appliction therefor, and it was ordered in pursuance of *of*
172 the regular practice of your office and of circular instructions for all surveys of that class of land. The ordering of the survey as well as the approval thereof involved a decision that the land belonged to the United States.

There is nothing to show that the order of approval was procured by fraud, or that either was the result of inadvertence or mistake. As no grounds are presented for setting aside the action of your predecessor or to show that the lands were not subject to public survey, in accordance with the rulings and practice of your office, for a long series of years, the survey will not be disturbed, but will remain intact.

Your decision rejecting the riparian claims of De Witt and Hardin is therefore affirmed.

J. Peter Munhoven filed soldier's declaratory statement for lots 1, 2, & 3, of section 32, January 14, 1875, and made application to enter under the homestead laws at 9.35 a. m. of the same day. Additional homestead application in the name of William Brewer was filed for said tracts on the same day at 9 o'clock a. m. It appears from the testimony that Munhoven went upon the land September 8, 1874, and built a house, wherein he was residing at the date of trial. At the hearing F. A. Cleveland testified that the house
173 was built of material purchased by him with money furnished by Mr. McDaid. You decided that this improvement was not of such character as to give Munhoven any priority in equity, and that Brewer had the superior legal right to the land, and directed that his additional homestead application be received.

In this, I think, you erred. The house was an improvement upon the land and Munhoven resided in it, claiming it as his property. It was not claimed, as I understood it, by Cleveland or McDaid. In accordance with the rule announced in the decisions of this Department of July 12, 1879, in the case of Shadduck *v.* Homer and in the case of Lyons *v.* Stevens (Copp's L. O., vol. 6, p. 107), the bet-

ter right was in Munhoven, and his entry should be admitted as of the date of the filing of his application and remain intact, subject to final proof, unless in the meantime it be declared upon due proof to be invalid or to have been abandoned. Your decision in favor of Brewer is therefore reversed. Munhoven's application for a new trial, so far as it is based upon affidavits showing that he has resided upon the land since 1874 and cultivated the same every year since that time, and that he actually furnished the money to build his house thereon, need not be considered for reasons above stated.

But there is on file in this case an agreement, dated September 23, 1875, signed by Charles D. Gillmore, of this city, and
174 Munhoven, in which it is stated that, in consideration of the withdrawal by Gilmore of his claim, said Munhoven agrees to transfer and deed to Gilmore one undivided half of said tracts whenever he should have obtained title thereto under his homestead application.

In his affidavit of May 24, 1879, in support of his application for a new trial, Munhoven states that his signature was obtained by fraud and circumvention; that he is not well versed in the English language, and that he did not know that he signed such a paper. He virtually repudiates the contract, and, as the records do not show that Gilmore had any claim to withdraw or that he ever withdrew any claim to the land, the contract is apparently without consideration; still, it raises a very strong suspicion of the invalidity of Munhoven's claim, and, as he desires an opportunity to explain the matter, you will order an investigation, giving Munhoven an opportunity to present testimony in the premises.

Joseph Konyvesy filed pre-emption declaratory statement February 8, 1875, claiming lots 2 and 3 and the N. E. ¼ of N. E. ¼ of section 30, alleging settlement in 1868, and that he had fenced said land on three sides and had used it for plowing, meadow, and pasturage since that time, and that he built a house on lot 2 in January, 1875, in which he was residing at the time of filing his declaratory statement.

175 He offered no proof at the trial, for the reason that the local officers failed to give him notice of the hearing for that purpose. You held that this pre-emption claim was neither properly presentedn or followed up, and that it did not merit consideration, and thereupon you awarded the N. E. ¼ of N. E. ¼ and lot 3 to F. A. Cleveland, a pre-emption claimant, and lot 2 to John O. Hedlock.

Konyvesy appealed from so much of your decision only as affected said lot 2.

I think you erred in rejecting Konyvesy's claim and awarding to Medlock.

In the first place, the township plat was filed January 9, 1875, and the declaratory statement of Konyvesy was therefore presented in time, and he was entitled to a hearing after due notice before any other disposition was made of the land. Again, if, as was alleged, Konyvesy was in possession of the land, with valuable improvements thereon, and was actually residing there, according to the well-set-

tled rule of this Department the lot was not subject to the application of Medlock.

Your decision in this matter, to the extent appealed from, is reversed, with directions to order a hearing between Konyvesy and Medlock upon due notice to both parties.

176 Lyman D. McDaid filed soldier's homestead application January 14, 1874, for the N. W. ¼ of section 29, and on March 14, 1877, submitted proof in support thereof.

You awarded the N. ½ of said quarter to T. C. Wilkerson and John White, additional homestead claimants, and the south ½ to Solomon Field, a pre-emptor. McDaid appealed from the decision to the extent only of the award to Field, and under date of September 15, 1879, his attorney, H. O. McDaid, Esq., withdrew the appeal. The rights of the appellant and appellee, therefore, must be considered as determined by your decision.

My attention is called to a contract entered into September 23, 1875, between Charles D. Gillmore, of this city, of the first part, and the said Lyman D. McDaid and H. O. McDaid, of Chicago, of the second part. This contract discloses an unlawful collusion between the parties to secure title to the N. W. ¼ of section 29. Gilmore agreed to withdraw all claim to the N. ½ of said quarter section and consent to the issuing of patent therefor to McDaid, and, in consideration whereof, McDaid agreed to co-operate with and aid Gilmore in securing title to the S. ½ of said quarter section, either through Gilmore's claim or the soldier's homestead application of McDaid, and that if title should be obtained thereto by McDaid he

177 was to convey an undivided half thereof immediately to Gilmore.

Now, I understand that there were many conflicting claims asserted to the tracts surveyed as the bed of Wolf Lake, and that the land is deemed very valuable. Considering how few of these claims have been prosecuted by appeals from your decision, and in view of the fraudulent arrangements in two of the cases appealed, as shown by the contracts above referred to, while it is true that fraud should not be presumed in any case, I cannot divest my mind of a very strong impression that there may be other collusive arrangements than those referred to unknown to your office and this Department for securing title to said tracts or some of them, in accordance with which parties have desisted from further prosecution. To say the least, the acquiescence in the decisions by so many claimants to a body of very valuable land is something quite remarkable in the history of the practice of the Land Department. I am, therefore, of opinion that before the issuance of patents in any of these cases a thorough, searching investigation of the whole matter of the claims to this body of land should be had by a special agent.

The papers submitted by you with the said appeals are herewith returned.

178 Very respectfully, C. SCHURZ, *Secretary.*

The Commissioner of the General Land Office.

(Endorsed:) 1880. 31257. Interior Dep't. Secretary, May 4,

1880, returns papers in matter of appeal of J. Peter Munhoven *et* regarding lands in Wolf Lake, and is of opinion that an examin tion should be had. Copies sent to the various attorneys May and June 2, 1880. 2–1514. Benton. 9–326. F. May 5, 18 Def't's Exhibit 9.

179 4–207.

F. DEPARTMENT OF THE INTERIOR, T. R. B.
GENERAL LAND OFFICE, J. D. S.
WASHINGTON, D. C. *November* 25, 1882.

I, N. C. McFarland, Commissioner of the General Land Office, hereby certify that the annexed copy of the decision of the acti Secretary of the Interior of Aug. 24, 1880, dismissing the petiti of Gertrude N. Hardin for a rehearing in the matter of her cla to certain lands in T. 37 N., R. 15 E., 3rd P. M., Ills., is a true a literal exemplification from the original on file in this office.

In testimony whereof I have hereunto subscribed my name a caused the seal of this office to be affixed, at the city of Washingt on the day and year above written.

[SEAL.] N. C. McFARLAND,
Commissioner of General Land Office.

180 DEPARTMENT OF THE INTERIOR,
WASHINGTON, *August 24th*, 1880.

SIR: I have had under consideration a petition of Gertrude Hardin for a rehearing in the matter of her claim as riparian own to certain land in what is known as the bed of Wolf Lake, in tow ship 37, range 15 east, in the State of Illinois, decided by this D partment May 14, 1880.

The points raised and upon which a reversion of the decision the matter is asked may be stated in a general way as follows:

First. That the survey of 1874 was without authority of law a should be set aside.

Second. That the Department has no jurisdiction to dispose of a lands in said township other than those returned by the surve thereof executed in 1834 and 1835.

The same points were raised and argued upon the appeal fro your decision of February 12, 1878, and were considered and pass upon by the decision aforesaid.

The petition, therefore, is simply a reargument of the case
181 Gertrude N. Hardin, and it presents no new or addition reasons why the action of your predecessor in ordering a approving the survey of 1874 should be now disturbed. The d cision held in effect that the matter of ordering and approving said survey was *res adjudicata*, and that no case had been made o under the well-established rule to justify the present head of t Department in reopening or setting aside the action of your pred cessor in the premises. On further consideration I see no reas for receding from the decision, but, on the other hand, I find add tional grounds for adhering to it. I find from the records of yo

office that Mrs. Hardin had knowledge of the fact that the survey was being made and due notice of the approval thereof and of the filing of the plat in the local office at Springfield and took no appeal.

Considerable correspondence was had between Mr. I. N. Hardin, who appears as attorney-in-fact for Gertrude N. Hardin, and your office pending the survey. Mr. Hardin opposed the survey, claiming then, as he does now, as riparian owner.

On the 28th Nov., 1874, he was advised that the survey had been approved. On the 30th of December, 1874, he addressed a letter to your office, which the following reply thereto, under date of January 7, 1875, addressed to Mr. Hardin, at 238 So. Water St., Chicago, explains: "I am in receipt of your letter of the 30th ultimo,
182 requesting to be informed what effect the approval of the survey of Wolf Lake has upon the subject of your former communications, viz., the question raised by you as to the navigability of the waters of said lake. You also inquire whether this office regards the lands from which the waters have receded as public lands.

In reply I have to inform you that conclusive evidence having been filed in this office showing the non-navigability of the waters of the bed of said lake, and the survey having been made and approved, the plat thereof, together with instructions to the register and receiver, has this day been forwarded to the local land office at Springfield, Illinois.

The lands are regarded as public lands. (See copy of my circular of July 13, 1874, herewith enclosed.)"

Thus it appears that the petitioner had notice of the proceedings in the matter and of the decision and action of your predecessor therein and could have been fully heard by the head of the Department upon appeal, appeal in such matters being allowable. (Appeal of Caroline M. Forsyth, decided by this Department February 12, 1877, upon survey of lake beds in town. 38 north, range 10 west, Indiana.)

The petition is dismissed, and you will so advise the parties in interest.

The petition and accompanying papers and the reply thereto of John I. Bennett, Esq., are herewith transmitted for filing in
183 your office.

Very respectfully,

A. BELL,
Acting Secretary.

The Commissioner of the General Land Office.

(Endorsed:) 1880. 56722. Interior Dep't. Act'g Sec., Aug. 24, 1880, dismissed petition, with accompanying papers, of Gertrude N. Hardin for a rehearing in her case. 2–1514. Sept. 11, 1880. Copy sent to I. N. Hardin and J. I. Bennett. Benton. Papers received with this decision filed with case. 9–459. Aug. 25, 1880. F. Def't's Exhibit 10.

184 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 25, 1882.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of the decision of the acting Secretary of the Interior of May 16, 1881, rejecting the petition of I. N. Hardin for a rehearing in the matter of the claim of Gertrude H. Hardin to certain lands in town. 37 N., R. 15 E., 3d P. M., Ills., is a true and literal exemplification from the original on file in this office.

In testimony whereof I have hereunto subscribed my
[SEAL.] name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

N. C. McFARLAND,
Commissioner of General Land Office.

185 DEPARTMENT OF THE INTERIOR,
WASHINGTON, *May 16th*, 1881.

The Commissioner of the General Land Office.

SIR: On the 27th ultimo I. N. Hardin, Esq., through Hon. John A. Logan, filed an application for review of the decision of my predecessor of May 4, 1880, in the Wolf Lake case, involving tracts of land in township 37 N., R. 15 E., of the 3rd principal meridian, in the State of Illinois. So far as said decision relates to the claim of Gertrude Hardin, that application was denied by me on the 28th ultimo. I forward herewith a copy of my decision rejecting the same.

Mr. Hardin has made still another application for a review of that decision, which application was received on the 11th instant.

The application filed in April was disposed of on its merits, notwithstanding Mr. Hardin had not complied with the rules of practice in the following particulars:

First. No notice of the application was served on opposing parties, as required by rule 76 (Rules of Practice, p. 12).

Second. It was not accompanied by the affidavit required by rule 78 (*ibid*).

The application might have been rejected for the reasons above stated, but as it could not be allowed upon its merits it was deemed best to dispose of it as stated above.

186 The present application is subject to the same objection under the rules above cited, but, as under well-settled rules of administrative law I have not the authority to grant the application, I will not reject it on the ground alone of its irregularity, but will give my reasons why it could not be allowed if all the formalities and prerequisites of the Rules of Practice had been complied with.

The application under consideration presents nothing new and material to the Department, all the material matters alleged having been fully considered by my predecessor on the appeal from your decision of February 12, 1878, and in the decision rendered by him

August 24, 1880, rejecting an application of Gertrude Hardin for a rehearing of the case.

The first three reasons why a review or rehearing should be granted are stated by Mrs. Hardin thus:

(1.) Because the claim of Mrs. Hardin has never been considered, heard, or adjudicated.

(2.) Because her claim has been denied without a hearing.

(3.) Because her claim has been denied a hearing for the sole reason of an act of the General Land Office, which act is admitted to have been unlawful.

These objections involve but one point differently stated—that is, that Mrs. Hardin has never had her day in court. In the decision of August 24, 1880, above referred to, my predecessor considered this point and showed that Mrs. Hardin had notice of
187 the survey of 1874 and an opportunity to make such objections thereto as she might be advised were proper and could have appealed from the approval of said survey.

The approval of that survey was necessarily made upon a final decision by the Commissioner of the whole matter then before him. The approval was the result and expression of that decision. That decision affected the claimed rights of Gertrude Hardin, and from it she could have appealed. The right of appeal was not exercised, and her rights were concluded, so far as this Department is concerned. The right of appeal has now expired and no appeal can be allowed. As to the statement that the act of the Commissioner in approving said survey was illegal and is admitted to be so, I have to say that I know of no decision of your office or this Department in which such admission is made. On this point my predecessor, in the decision of May 4, 1880, said: "You reject their claims (Hardin's and De Witt's) on the ground that they have been denied by the action of your office in ordering and approving the survey of the lake bed, thus treating the land as belonging to the United States." It seems to me that no other decision can consistently be reached. To recognize riparian rights to these tracts would be equivalent to saying that the lands do not belong to the United States, and that the survey was a nullity. It is now too late
188 for this Department to question the legality of the survey. It is an accomplished fact it was ordered, begun, and fully executed under a former administration. * * *

"Your predecessor decided to order the survey upon consideration of the application therefor, and it was ordered in pursuance of the regular practice of your office and of circular instructions for all surveys of that class of lands. The ordering of the survey, as well as the approval therefor, involved a decision that the land belonged to the United States. There is nothing to show that the order or approval was procured by fraud, or that either was the result of inadvertence or mistake. As no grounds are presented for setting aside the action of your predecessor or to show that the lands were not subject to public survey in accordance with the rulings and practice of your office for a long series of years, the survey will not be disturbed, but remain intact."

No further reply to the allegation that the survey of 1874 is admittedly illegal is necessary.

The next point in the application is stated as follows:

"(4.) Because the decision of the Commissioner of the General Land Office is contrary to the previous declarations of that officer."

The previous declarations referred to are alleged to be contained in a letter of Commissioner Drummond, under date of March
189 9, 1874, to John R. Lewis, which Mr. Hardin alleges is in the following language:

"In reply to yours of the 28th ultimo I have to state that the S. W. fr'l q'r of sec. 20, T. 37, R. 15 E. of 3 P. M., was entered by H. B. De Witt July 16, 1848, and patented to him March 1, 1850, and no additional survey has ever been made of the above tract, and if the area of the original survey, 4.53 acres, has increased by accretions it enures to the original purchaser or his assignees." It is claimed, inferentially, that this letter bound Mr. Drummond's successor, and that, as Mr. Hardin has recently discovered it, it is such newly discovered evidence as authorizes this Department to reopen the case under the rule announced in the decision of April 28, 1881. The first observation upon this point is that the discovery of new documentary evidence that might have been obtained in season will not authorize a new trial; so, where the newly discovered evidence was all of record in the court or in a public office and might have been found by reasonable search, it has been held that this furnished no reason for a new trial. (Hilliard on New Trials, 2d ed., p. 489, sec. 9; decision of this Department in the matter of the survey of the Chauvin grant, rendered March 2, 1881.)

Again, that letter referred to other land than that entered or claimed by Hardin. It was not a decision upon any case
190 pending before the General Land Office, but was merely a letter addressed to a private individual in reply to one from him.

It was simply the opinion of the Commissioner as to the rights of riparian owners to accretions. There is, I believe, no sustained allegation that the lands surveyed as the bed of Wolf Lake are accretions as the term accretion is understood in law.

In my opinion the letter referred to would not have precluded the Commissioner of the General Land Office from approving the survey of 1874 had it been called especially to his attention. Therefore whether he had knowledge of the letter, actually or constructively, when he approved said survey is an unimportant matter that requires no further inquiry here. To procure a new trial the evidence relied on should not only be newly discovered in the true legal sense, but it should be such as would have induced a different conclusion or as would compel a different decision on the new trial. There is, therefore, no new evidence presented to give me jurisdiction to overturn or reopen the deliberate decisions of my predecessor.

As to the allegations of error in my predecessor's decision, it is sufficient to say that there is no appeal from the decision of the head of a department to his successor in office.

As to the allegation that the case is still before the Depart-
191 ment, it is sufficient to say that the question as to whether or not the land claimed by Mrs. Hardin belongs to the United States is no longer before the Department, that being the very question decided by the approval of the survey, and which my predecessor, upon full consideration of the entire case, refused to reopen, and that my predecessor rejected in terms the claim of Mrs. Hardin. There may be other matters connected with the Wolf Lake case still pending, but the question of Mrs. Hardin's claim is not among them.

The applicant has her remedy in court for her alleged rights in the premises. If the survey was illegal and unauthorized, as alleged, the courts in a proper case can so declare, but in law the matter is beyond the jurisdiction of this Department.

The application for review is therefore rejected.

The application filed on the 27th ultimo and the one hereby rejected are herewith forwarded for the files of your office. You will advise Mr. Hardin of this decision in the usual manner.

Very respectfully, A. BELL,
Acting Secretary.

Endorsed on the back is the following: General Land Office. Rec'd May 17, 1881. 33306. Interior Dept. Act'g Sec., May 16, 1881, refers papers and rejects application of I. N. Hardin for review of decision in Wolf Lake case. 2–1514. Copy sent to Hardin May 24, 1881. 10–300. F.

192 DEPARTMENT OF THE INTERIOR,
WASHINGTON, 23*d Nov.*, 1882.

I, H. M. Teller, Secretary of the Interior, hereby certify that the paper hereto attached is a true copy of the original as the same appear of record in this Department.

In testimony whereof I have hereunto subscribed my
[SEAL.] name and caused the seal of the Department to be affixed the day and year first above written.

H. M. TELLER, *Secretary.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, 28*th April*, 1881.

I. N. Hardin, Esq., Aurora, Illinois.

SIR: I have received, through Senator John A. Logan, your letter of the 18th instant in relation to certain lands in town. 37 N., range 15, 3rd principal meridian, Illinois.

After reciting the action of the General Land Office and of the Department in the matter you ask me to institute a careful inquiry into the facts and meanwhile to prevent the issuance of pat-
193 ents or any further acts to the detriment of your lawful rights.

I find that on the 4th May last my immediate predecessor, in an elaborate discussion of the question at issue in this case, affirmed

the action of the Commissioner of the General Land Office in rejecting the riparian claims of De Witt and Hardin.

On the 24th August last he overruled an application of Hrs. Hardin for a rehearing in the case.

I am concluded by his action in the matter. The authorities on this point are so numerous and have been so often cited that I deem it unnecessary to repeat them here.

"It is very well settled that when a Secretary has officially decided or determined any matter or case and goes out of office leaving the decision on record his successor cannot lawfully overturn it unless upon the production of such new evidence as would be sufficient in a court of chancery to sustain a bill of review or to get a new trial in a court of law."

(9 Opin. of Attorneys General, 101.)

It is not pretended in this case that any new evidence has been discovered, and I cannot but regard the matter as *res judicata*, which I am not at liberty to disturb. I am therefore constrained to decline acceding to your request.

Very respectfully, S. J. KIRKWOOD, *Secretary.*

194 To the offering of which several decisions plaintiff objected; but the court overruled said objections respectively and received the same; to which action of the court plaintiff duly excepted.

And, forasmuch as the matters and things aforesaid do not appear of record, the plaintiff has tendered this her bill of exceptions, and prays that the same may be signed and sealed and made a part of the record in said cause, and it is accordingly done.

WALTER Q. GRESHAM,
Circuit Judge.

Endorsed: Filed Jan'y 18, 1886. Wm. H. Bradley, clerk.

195 Afterwards, to wit, on the eighth day of August, 1887, there was filed in said clerk's office a bond in said entitled cause; which said bond is in the words and figures following, to wit:

Bond.

Supreme Court of the United States.

GERTRUDE H. HARDIN
vs.
CONRAD N. JORDAN. } In Ejectment.

Know all men by these presents that we, Gertrude H. Hardin, Isaac N. Hardin, and F. E. Hinckley, of Chicago, Illinois, are held and firmly bound unto Conrad N. Jordan in the sum of five hundred dollars ($500), to be paid to the said Conrad N. Jordan or his executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and sev-

erally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 4th day of March, A. D. 1887.

Whereas the above-named Gertrude H. Hardin hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the northern district
196 & 197 of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named Gertrude H. Hardin shall prosecute her said writ of error to effect and answer all costs which may be awarded or adjudged against her if she shall fail to make good her plea, then this obligation shall be void; otherwise to remain in full force and virtue.

GERTRUDE H. HARDIN. [SEAL.]
ISAAC N. HARDIN. [SEAL.]
F. E. HINCKLEY. [SEAL.]

Approved.
W. Q. GRESHAM.

Endorsed: Filed August 8th, 1887. Wm. H. Bradley, clerk.

198 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein Gertrude H. Hardin is the plaintiff and Conrad N. Jordan is the defendant, as the same appear from the files and records of said court now remaining in my custody and control.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this twenty-fourth day of September, 1887.

WM. H. BRADLEY, *Clerk.*

199 UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you, in said circuit court, between Gertrude H. Hardin, plaintiff in error, and Conrad N. Jordan, defendant in error, in an action of ejectment, a manifest error hath happened, to the great damage of the said Gertrude H. Hardin, plaintiff in error, as by her complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are

hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1887, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this nineteenth day of January, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the 11th year.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

WM. H. BRADLEY,
Clerk of the Circuit Court of the United States for the Northern District of Illinois.

[Endorsed:] Supreme Court of the United States. Gertrude H. Hardin, plaintiff in error, *vs.* Conrad N. Jordan, defendant in error. Writ of error. Copy deposited for the defendant in error in the clerk's office, U. S. northern district of Illinois.

200 UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

To Conrad N. Jordan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1887, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Gertrude H. Hardin is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Walter Q. Gresham, circuit judge of the United States for the seventh circuit, this 8th day of August, in the year of our Lord one thousand eight hundred and eighty-seven.

W. Q. GRESHAM,
Circuit Judge.

201 [Endorsed:] Supreme Court of the United States. Gertrude H. Hardin *vs.* Conrad N. Jordan. Citation to October term, A. D. 1887.

I hereby accept service of a true copy of the within citation this 16th day of August, 1887.

JOHN I. BENNETT,
Att'y of Record for said Jordan.

202 Supreme Court of the United States of the October Term thereof, in the year of our Lord one thousand eight hundred and eighty-seven.

GERTRUDE H. HARDIN, Pl'ff in Error, *v.* CONRAD N. JORDAN, D'f't in Error.	Error to the Circuit Court of the United States for the Northern District of Illinois.

And now, to wit, on the second Monday of October, A. D. 1887, in this same term, before the justices of the Supreme Court of the United States, sitting in the city of Washington, comes the said Gertrude H. Hardin, plaintiff in error herein, by Thomas Dent, her attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

First. That the circuit court erred in construing the patent to John Holbrook, plaintiff's ancestor, and in restricting the recovery of the plaintiff and in denying to the plaintiff judgment for a part of the lands claimed in the declaration.

Second. That said court erred in refusing to hold that the plaintiff, as a riparian proprietor, took to the centre of the so-called "navigable lake" or body of water shown upon the plat referred to in the certificate of special findings and in not holding this to be so as to all the lands covered by the patent to plaintiff's ancestor upon said "navigable lake" or body of water.

Third. That said court erred in holding that as to the east fraction of the southeast quarter of section thirty (30) the plaintiff was limited in title and right of possession by a supposed meander line and was not as to said fraction entitled to claim the lake or body of water as a boundary.

Fourth. That said court erred in the admission of evidence on the part of the defendant in the court below, to wit:

1. In allowing the introduction of a certain plat and also of certain testimony respecting a survey of certain lands and their supposed physical and topographical features.

2. In admitting evidence on the part of the defendant of a plat or map of a survey of the bed of Wolf Lake supposed to have been made by Alexander Wolcott in 1874.

203 3. In admitting supposed patents from the United States for territory supposed to be embraced within a supposed meander line run by the surveyor in the original Government survey and in admitting supposed deeds from such supposed patentees to the defendant in error.

4. In admitting the supposed decision of the Commissioner of the General Land Office in the matter of the claim of the Illinois Central Railroad Company and others and the supposed decisions of the Secretary of the Interior upon the appeal of Hardin *et al.*

Fifth. That the finding and judgment respectively of the said circuit court ought to have been for the plaintiff in respect to all the lands claimed in the declaration and not for the defendant in respect to any part thereof.

And the said Gertrude H. Harbin prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, so far as the same was against her, and that she may be restored to all things which she hath lost by reason of the said judgment, &c.

THOMAS DENT,
Att'y & of Counsel for Plaintiff in Error.

Endorsed on cover: N. Illinois C. C. U. S. No. 161. Gertrude H. Hardin, plaintiff in error, *vs.* Conrad N. Jordan. Filed October 8, 1887.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

No. 161.

GERTRUDE H. HARDIN,
Plaintiff in Error,
vs.
CONRAD N. JORDAN,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

POINTS (Partly in Reply) FOR THE PLAINTIFF IN ERROR.

THOMAS DENT,
FOR PLAINTIFF IN ERROR.

And the said Gertrude H. Harbin prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, so far as the same was against her, and that she may be restored to all things which she hath lost by reason of the said judgment, &c.

THOMAS DENT,
Att'y & of Counsel for Plaintiff in Error.

Endorsed on cover: N. Illinois C. C. U. S. No. 161. Gertrude H. Hardin, plaintiff in error, *vs.* Conrad N. Jordan. Filed October 8, 1887.

Office Supreme Court U. S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

No. 161.

GERTRUDE H. HARDIN,
Plaintiff in Error,
vs.
CONRAD N. JORDAN,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

POINTS (Partly in Reply) FOR THE PLAINTIFF IN ERROR.

THOMAS DENT,
FOR PLAINTIFF IN ERROR.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1890.

No. 161.

GERTRUDE H. HARDIN,
Plaintiff in Error,
vs.
CONRAD N. JORDAN,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

POINTS (PARTLY IN REPLY) FOR THE PLAINTIFF IN ERROR.

I.

THE DEFENDANT CANNOT EVADE JUDGMENT BY PRETENDING THAT THE DECLARATION DID NOT CLAIM THE PROPERTY. THE DESCRIPTION WAS AND IS AMPLE.

His counsel suggests a question in this regard, as to the tract in the South East quarter of section 30. *It was not raised in the court below*, and besides there is no ground for the question.

The controversy was over lands which the plaintiff claimed under a patent based on a survey made in 1834—

5, but which the defendant claimed under a survey made in 1874, the latter survey being ostensibly and in fact of what was a lake at the time of said former survey; and no question was made in the Circuit Court as to the sufficiency of the declaration as claiming property embraced in said second survey.

In the declarations as originally filed the description of the three parcels belonging to the plaintiff followed the patent to John Holbrook, giving the description which is stated in the special findings; and it was alleged that the defendants wrongfully withheld defined portions thereof which on observing the plat will be seen to include the part of the lake claimed by the defendants. (Printed Transcript, 2, 11, 17, 24, 52.)

The allegation concerning more especially the part of he South East quarter of section thirty bounded a full eighty acre tract of which the 2.04 acres was part. (*Ib.* 17.)

In an amended declaration which was filed March 9, 1883, the same description was given with the addition of other words, to wit: "together with all accretions and relictions forming a part thereof" (that is to say, a part of the three tracts named).

The Circuit Court, Judge BUNN presiding, held that this declaration was "good to recover the land definitely described by government descriptions, but not to recover any relictions or accretions appurtenant thereto, or belonging therewith, lying outside such government descriptions." (Transcript, 40.)

Thereupon the present defendant pleaded the general issue, and also a plea denying that he was in possession of or claimed title to the premises, describing them by the

terms or phrases used in said patent to John Holbrook. (Printed Transcript, 42.)

Subsequently, to wit: December 8, 1884, after the first trial of the cause, which was before his Honor Judge Blodgett, the plaintiff took leave to file an additional count to the declaration, and in this additional count gave a larger description as to all the tracts, a description so comprehensive that there could not be room for any doubt as to the property which the plaintiff claimed, including riparian rights and the title to the bed of the lake. For example, take the southernmost tract, about which the question is raised, it being the one in the south-east quarter of section 30. This tract was described in this additional count as the south-east quarter of section 30. After the description of the three parcels so as to comprehend all the land that would be in the respective quarter sections wherein they were originally surveyed as fractions, there followed the following words, to wit: "With all accretions, alluvions and relictions, to wit: all "the land lying between the west boundary line of said "south-east quarter of section nineteen, and the west line "of said north-east quarter of section thirty, and the mid-"dle line of the permanent water of the lake east of said "line, sometimes designated and known as 'Navigable "Lake' and sometimes as 'Wolf Lake,' and also all the "land lying between the sectional lines of said south-east "quarter of section thirty and said lake." (Transcript, 46, 47.)

To this additional count the defendant filed a plea referring to the premises by the larger description of full *quarter sections as mentioned in said additional count*, and also another plea stating that the defendant was not in possession of, and did not claim title to, the property

described in the said additional count by the government descriptions (these descriptions being, as before stated, those of the patent to John Holbrook. (Transcript, 47, 48.)

Now, to square out the several quarter sections named, as this additional count provided, and to extend the two northernmost tracts to the middle line of the permanent water of the lake, in connection with squaring out the southernmost tract to the full dimensions of a quarter section abutting on the south line of one of the other tracts as extended, we take in the whole territory that may be said to be in controversy. This clearly and fully raised the question, whether the defendant had a right to claim the lake-bed under the survey of 1874, or under any pretense whatever.

Two suggestions seem to answer the query, if it may be so called, of the defendant's counsel, and they conclude the matter:

1. The descriptions given in the patent to John Holbrook, by which the lands were conveyed according to the official plat of the survey, etc., were sufficient. The land, as platted, was situated on the lake, and therefore Mr. Holbrook, as a riparian proprietor of those lands, had rights in the lake. The right or property accruing to him as the owner of those lands in respect to the lake was annexed to the property of which he was the owner.

As stated in the note to *Ex parte* Jennings, 6 Cowen, 548: "Where one owns the shore of the river above "tide, by grant from the state, common law (*common "right*) annexes to his capacity as owner the right of soil "in the river *usque filum aquæ*."

This being so, it might, by putting reason above tech-

nicality, be said that the defendant by his second plea to the additional count, it being the plea at pages 47 and 48 of the transcript, confessed the plaintiff's right of action in full.

2. But if under his pleas to the amended declaration, and to said additional count, the defendant may be said to have put the plaintiff upon his proofs as to the lands originally in the lake-bed, or outside of the meander line, then the large description which was given by the additional count to the declaration, omitting all reference to fractions of quarters, and embracing full quarters, and also embracing the land in the lake to the center of the lake, was abundantly sufficient. This description showed that the plaintiff claimed the full limits of the south-east quarter of section thirty, and also claimed to the center of that part of the lake which was east of the two other tracts, or which would be included within an extension of the north line of the south-east quarter of section nineteen eastward, and a like extension of the south line of the north-east quarter of section thirty. The various descriptions would entirely embrace the part of the lake which may be said to have been attempted to be taken away from the plaintiff by the survey of 1874.

II.

NOR SHOULD THE DEFENDANT BE ALLOWED TO WEAVE INTO THE SPECIAL FINDINGS HIS EXHIBIT 4, ON WHICH HE RELIES SO MUCH AS SHOWING THE TOPOGRAPHY OF THE LAKE IN 1884. THE VIEWS SUGGESTED IN THE BRIEF OF THE LEARNED COUNSEL FOR THE DEFENDANT AS TO VARIOUS INFERENCES DEPENDING UPON THE SAID EXHIBIT, ARE QUITE ASTRAY.

At page 14 of his brief, the counsel says it is admitted in the brief (referring to the brief for appellant), that Judge Gresham's special findings followed said exhibit. At page 16 the counsel says it is conceded that this exhibit is "in accord * * * *in a large measure* * * " * with Judge Gresham's special findings."

It was stated in the brief for the appellant that said Defendant's Exhibit 4 is unfair in its representation of the lake (Plaintiff's Brief, 34), and that said "Exhibit 4" is not accredited in the special findings save as evidence of the meander line (*Ib.*), and as to part of the description thereon of a ridge. (*Ib.*, 47.)

The special findings do not show that the lake was the same in 1884, or at the time of the trial, as at the time of the government survey in 1834 and 1835. Nor do those findings show that even in 1884 there were two distinct lakes as separate bodies of water; the finding speaking of the water as the "lake or lakes" at the time of the trial in 1885. (Trans., 58, 59.) Nor is there anything in the special findings to justify a claim that said Defendant's Exhibit 4 represents the body or bodies of water as the same existed at the time of said government survey. It is right to go farther, and to as-

sert positively that the special findings do not admit the truthfulness of said Exhibit 4 in any other features than those we have named. Even as to those features, since there was no adoption of said exhibit, nor any embodiment of it in any form in the special findings, it is questionable how far the court was influenced by either said exhibit or the evidence connected with it set out in the bill of exceptions. The special findings discard the exhibit, and make statements at variance with it. For example: The sixth item in the special findings states that the "level of water in said lake or lakes is subject to "fluctuations alike from storms, winds, etc., and also from "the operation of rains, thaws, evaporations, etc., that "said lake or lakes is or are occupied by permanent "water, and substantially the entire bottom thereof is be-"low the mean level of Lake Michigan, and the greater "portion of it is below extreme low water in said Lake "Michigan, so that said lake or lakes never become en-"tirely dry, etc. (Trans., 58; Plaintiff's Brief, 6, 7.)

And item seven of said special findings says: "That "at times of high water, however produced, the water "in said lake or lakes extends to and beyond the limits "that it occupied at the time of said government sur-"vey. (Transcript, 59; Plaintiff's brief, 7.)

When we consider that those findings were accompanied by the plat of the survey of 1834 and 1835, and that that plat was adopted as representing the survey of 1874, so far as the representation of the lake was concerned, it must be evident that the Defendant's Exhibit 4 was discarded as an attempt to represent the lake, and especially so in respect to the elevations.

Item six of the special findings compares the facts proved with the official plat of the survey of 1834, and

in so doing states not only that the lake is occupied by permanent water, and that substantially the entire bottom thereof is below the mean level of Lake Michigan, but that the greater portion of it is below extreme low water in said Lake Michigan, and besides that *no considerable portion thereof within its margin as shown by the said government plat*, that is, the plat of the survey of 1834–5, has ever been fit for cultivation, save as to Elm Island and a certain ridge, both more especially described in a preceding part of the findings. (Transcript, 58.)

This is an adoption of the government plat of 1835 as to the lake, in contrast with the plat of the survey which was made by direction of the defendant in 1884, as represented in said Defendant's Exhibit 4.

The most that can be said for said exhibit is that it was professedly made up from a private survey procured by the defendant November 4, 1884—about fifty years after the making of the official plat according to which the three tracts entered by John Holbrook in 1838 were patented. But even a part of the testimony that was introduced by the defendant proves the incorrectness of the Exhibit so far as it professes to give elevations; for the bill of exceptions states that there was testimony introduced which, of course, was by the defendant, "tending "to show that the level of the water at the date of said "survey of November 4, 1884, was 2.44 feet above "datum." This being so, it will be seen from noticing the elevations given in the lower part of said Exhibit 4 that nearly the entire space represented by the map as land, within the supposed meander line, would be submerged; for the most of the elevations shown by the Exhibit are less than 2.44 feet. Apply the same fact also to

the fringe of land supposed, from said exhibit, to border on the west side of the lake between the open water and the supposed meander line, and that would be submerged also. This demonstrates the fact that the outlines of the water are not correctly shown in said Exhibit 4. Of course, when considered with reference to the statement in the special findings, as to the fluctuations of the lake, (Item 6 of special findings; transcript 58), the exhibit will be seen to have no value as evidence of what is the usual stage of water. November 4, 1884, may, in other words, have been a date when the lake was unusually low. Nothing appears in the case to justify taking that date as a date proper to be chosen for showing the usual elevations of the water.

In comparing the special findings with said Defendant's Exhibit 4, it will be seen that the findings not only show that the lake at the time of the survey of 1834 and 1835 occupied, with the possible exception of a small part of said ridge, the full limits represented on the map of the survey of 1834, but that when the level of water reaches 2.2 feet above datum, those limits are still occupied. Remember here, also, that the findings show that the average level of water in Lake Michigan is about 1.8 feet above datum, and that substantially the entire bottom of this lake is below the mean level of Lake Michigan, and the greater portion of it below extreme low water in that lake. (Transcript, 58, 59.) All this disproves the correctness of the representations on said exhibit as to elevations.

The brief of defendant's counsel invites an examination of item four of the special findings to see what it says about the ridge of land hereinabove mentioned, it being the ridge which the findings state was crossed in mean-

dering the lake in the survey of 1834 and 1835. (Transcript 57.) Said "Defendant's Exhibit 4" is brought forward to support a theory that such a ridge as that exhibit shows divides into two bodies or lakes the lake represented on the official plat of the survey of 1834 and 1835. The argument of the counsel for the defendant is that such is the case. Is that argument based upon the special findings? The answer is: No, it has no support from those findings. They describe the ridge as extending from the center of fractional section 20 in a southerly direction towards, etc., and enter into minute details as to the distance to which it extends, and the character of parts of it in respect to both length and width, and what has grown upon it. *There is no authority, however, for a claim that a ridge as great in extent, either in length or width, or with such growth upon it, existed at the time of the official survey of 1834 and 1835.*

There is a wide difference between the theory suggested in defendant's brief as to this ridge and the statements made in the spccial findings. The difference is not quite explicable, even with the idea intimated by defendant's brief, that said Exhibit 4 is to be the explanation of, or commentary upon, the special findings. Those special fiindings, however, do not need such a commentary, nor does the case admit of the same.

In the brief for the plaintiff, page 37, it was said: "It "cannot be urged that the special findings state that the "said ridge extends to the south side of the lake. * * "* Nor do the special findings show as to this part of "the lake that land which ought to have been surveyed "or estimated was omitted by Deputy Surveyor Clark in "taking the courses and distances along the margin of "the lake."

These expressions are believed to be in correspondence with the special findings, and accurate and authentic.

It was further said in the same brief, pages 42–3: "The special findings indicate that the supposed de- "parture by Deputy Surveyor Clark in his survey along "or around the margin of the lake in 1834, from a close "contact with such margin," was in "that the meander "was across a certain ridge extending from the center of "fractional section 20 in a southerly direction," etc.

The expression of the special findings is that the ridge is a *strip of land projecting into the body of water.* (Transcript 57.)

A previous expression in the same item of the findings is that the "lake was in fact meandered by the surveyor, "'the meander line being run substantially upon the "margin of said lake, as shown by said plat,' (that of the "survey of 1834 and 1835, Rec., 118), 'save as follows, "viz: that the said line was carried across a certain ridge "of land,'" etc.

The expression "carried across" applies to the northern part of the ridge, and to no other part of it. As was stated in Appellant's Brief, pages 45–6, it appears, on comparing the official plat of the survey of 1834 with the supposed meander line which Defendant's Exhibit 4 professes to give, that Deputy Surveyor Clark did not disregard the fact that there was a projection of land southwardly from the center of section 20, which center he was not required to mark in the performance of his official duties. But if said exhibit is true as to the meander line at this point, then it further appears, as may be repeated, that he recognized the ridge; for in running the meander south-eastwardly on the north side of the lake,

from a point in the north-west quarter of section 20, he ran through a part of the lake into this supposed ridge, at a point which Exhibit 4 reports as being 2.4 feet above datum, this being below high water mark in the lake, and then turned upon a course a little south of east for some distance before striking any point which would be above the level of the lake at a medium stage of water. (Appellant's Brief, pages 45–6.)

The expression of this fact in appellant's brief was less emphatic than the facts would have justified.

In the brief for the defendant there are many expressions as to this ridge that are contrary to the special findings, and not authorized thereby. Such expressions, for example, as these: "The court also found in his special "findings that there was *always* a body of land running "in a north-easterly and south-westerly direction from the "north-easterly part of the south-west quarter of section "20 *to about the south-west corner of section 29, entirely* "*dividing* (*except in times of high water*) the waters of "what for many years has been known as Wolf and "Hyde lakes." (Appellant's brief, p. 2.) The whole expression is erroneous, and the words italicized suggest a theory improvised by the writer of the brief. Then, at the same page, is a like error, that "this belt of land sep- "arated the waters of what is called Hyde lake ~~and of~~ on the West "~~Wolf~~ from those of Wolf lake on the east, except at "times of high water," etc. Then, at page 2 is the unauthorized statement that the findings "fully verify the "map." (Defendant's Exhibit 4.) These are misconceptions of the findings, and the pretended statement in the brief at pages 2 and 3 of the findings as to this ridge is not correct, but is an erroneous rendering of the same. Nor is it true, as is intimated or impliedly stated at page

5 of said brief, that the Circuit judge found in the special findings what were the elevations of the land in 1835, "when the Clark survey was made," either in the quarter of the lake next to the east fraction of the south-east quarter of section 30, as is so intimated, or elsewhere. It would have required more than human wisdom to determine such a matter, and the court did not assume divine powers. If the court had intended to find that those were the elevations at this point, or elsewhere, at the time of the survey in 1835, the fact could have been readily stated. The absence of the statement shows that the court did not so find.

The frequent repetition in the brief, as again at pages 3, 4, 5, 8, 13 and 14, of the fanciful idea that the special findings verified Defendant's Exhibit 4, or indorsed it as to the elevations, or applied it as representing as the same were in 1834 and 1835, the elevations or the contour of the lake, or the size of the ridge, betrays an over-weening desire to have said exhibit treated as a part of or interwoven with the special findings. The effort must fail. It appears from other parts of the brief that it was realized that said exhibit was neither incorporated in the special findings nor indorsed by the court. Thus in various places in the brief, as at pages 4 and 47, for example, are efforts in another line to procure an indorsement of said exhibit, by claiming that it was "verified by witnesses," or that the "evidence in this case shows," etc.

This matter seems to be put at rest by such considerations as follow:

(1.) The exhibit was introduced in evidence against the objection of the plaintiff as a map. *But as a map of what?* Its title was, "*Map showing topography in Sec-*

"*tions 19, 20, 29, 30, in T. 37, N. R. 15 E. of the 3d P.* "*M., Nov. 4, 1884.*" (See the exhibit itself, Rec., 161.) It was a wolf in sheep's clothing if the purpose of introducing it was to show what was the topography in 1835.

It would have been a ridiculous farce to have given the map such a character, and then to have asked the court to accept it, not as representing a survey on the 4th of November, 1884, as the map pretended, but as representing the state of things in 1834 and 1835.

(2.) This shows that said "Defendant's Exhibit 4," must, according to the principles of common sense, be disconnected in fact, as in reality it is disconnected from the special findings.

When analyzed, item 4 of the special findings will be seen to be mainly in the present tense, stating how the ridge, how the growth is, etc., and not how the same were in 1834.

At page 4 of the brief is a seeming quotation from a letter or decision of Mr. Commissioner Williamson, of the General Land Office, February 12, 1878. (Transcript, 81–2.)

But the quotation stops short of showing what the commissioner said.

The statement of the commissioner had reference to the purport or tendency of evidence which came under his consideration upon the question whether the survey of 1835 rightfully treated the lake as one with no division into two parts. The commissioner did not assume, nor find, that the ridge divided the lake into two bodies in 1835. He only stated that the "evidence against it showed "that * * * there was in 1850 a strip of timbered "land," etc. This was not a finding that there was such a

strip extending from the north side of the lake to the south side of it in 1835. The commissioner stated in a part of the same sentence from which the brief quotes, something which the brief carefully omits, to wit: "The "testimony as to the width of this strip in 1850 is so con- "flicting that it is not practicable to determine, even ap- "proximately, its area in section 20; and as the existence "of a sufficient portion of land or swamp to bring any "subdivision within the description of swamp land in 1850 "has not been established, I have preferred, inasmuch as "the area of land in section 20 in 1850 would be very "small if the utmost claim were allowed, to consider the "failure to establish the swampy character of the land in "1850, as a failure to show that the plat of 1835 did not "correctly represent the boundaries of the land in 1850." (Transcript, 82.)

Here, if the counsel had chosen to give the whole of the statement of the commissioner, as contained in one sentence partly quoted by the counsel, it would have been seen that the commissioner, after considering evidence which had reference to the state of the lake and of the lands in 1850, concluded that the plat of the survey of 1835 was correct at the time, and that there was not in the next fifteen years thereafter such change as required a correction of the plat. The accuracy of the plat as of 1835 was not disputed by the commissioner. Nor does he say that in 1835 the body represented as one lake on the plat was then divided into two bodies. The inference is strong that the division, if there was such, was not in 1835, nor complete even in 1850, and as to the borders of the lake the statement is what appeared in 1850, there being then but a "small strip of land" between the actual borders of the lake and its borders as laid down in the survey of 1835. (Transcript, 81.)

No effect, so far as this case is concerned, is to be attributed to the extent or character of the ridge described in item 4 of the special findings, as projecting into the lake in a southerly direction from the center of fractional section 20. If it did exist to some extent in 1835, the fact would not change our rights in respect to the east fraction of the south-east quarter of section 30, which bordered on the lake without being a part of the ridge. It was no mistake when in the plaintiff's brief such a phrase was used with reference to this ridge, "as juts in-"to the water," making allusion to a part of the special findings to which reference was, in the same immediate connection, made. Nor can it be fairly argued that that expression was not justifiable as applied to the time when the making of the survey of 1834–5 was the material time.

Item 4 of the special findings (Transcript, 57–8) may be supposed to indicate that the ridge existed in 1835 at a certain point, to wit: on the north side of the lake. This may not be clear, but allow that such might be the inference, yet the findings show that the ridge disappears before reaching the south side of the lake. They trace it as extending "towards," etc. They describe such extent by stating the distance: "Said ridge or strip of "land thus projecting into said body of water southerly "about 220 rods." That is the length of the ridge, but that would not carry it across the lake. The word "to-"wards," with other expressions, proves the fact, as found by the court, that the ridge did not extend across the lake. The findings (to follow them as to this matter) next state that the ridge is of varying width and elevation, the width not being over 28 rods at the north end, though in some places it is said to be slightly wider, and in some

places narrower. Yet there is said to be a depression about 140 rods from the northern point, and that in extending south from said 140 rods point, the ridge is slightly narrower and lower for a distance of about 80 rods, *where it disappears.* The findings then state that from there to a point south about 80 or 90 rods the *bed* and growth are of the same general character as the bed and growth along the margin of the lake; that on either side of the ridge, reeds and coarse grass grow in the water, and that there is nothing but such growth to obstruct the flow of water from one side to the other, the depth at this point being sufficient at high water to enable skiffs and small boats to be rowed through from one side to the other. The findings state that at the south limit of this low tract is a small body of land known as Elm Island or Fogli's place, to the extent of one and a half or two acres, "upon which timber grows of the same character "as that on the ridge," and that to the south of this island for about 50 rods there is water at high stages and marsh at medium stages. While the findings state that "on "passing over this 50 rods, the ridge appears again as "dry land about 30 rods, a little east of north from the "north point of the meander line of the point of land com-"prising fractional section 29," etc.

There follows a general description of the growth on the east and west margins of the ridge to the north as well as in the space between the ridge and Elm island, and also in the space south of Elm island. The vegetation is stated to be "solely a marsh growth of reeds and "coarse grass *growing in the water*, and of uniform char-"acter." The findings then add: "The same is true as "to the southerly portion of the lake west of the plaint-"iff's land in the east fraction of the south-east fractional "quarter of section 30."

Then follows a statement as to the "physicial condi-"tion" west of the meander of the last mentioned tract. Such condition is stated to be the same for a distance of 91 or more rods westerly as it is generally at and along said meander line, (meaning apparently the meander around the lake generally,) "the same character of "growth as aforesaid *appearing in the water at ordinary* "and high stages for said distance west of said line." The findings, *which, it will be remembered, are of the appearances in 1885, and not as of 1834*, say that "the point "at which to the south, the open water of said lake ceases "and the marsh grass begins is several rods north of the "south line of said section 30." (Trans., 58.)

(3.) It would not be right to allow the counsel to apply to this case any fact or facts which may be supposed to appear in another case, to wit: *Mitchell* v. *Jordan*, No. 167 of the present docket of this court. This he seems to attempt to do by suggestions made at page 7 of his brief.

A question whether there was a mistake in the survey of 1834, in omitting to survey and delineate upon the official plat the ridge supposed to extend southward from near the center of section 20, might concern the owner of lands in that section on the lake side of the supposed meander line, or might be pertinent to that case, but it should not be allowed to affect property rights pertaining to tracts to which the ridge did not and does not extend. Hence, what might be pertinent in the other case to which the counsel refers, would not on the face of it be pertinent to the present case.

The same remark is to be applied to the allusions in the brief of the learned counsel to facts supposed to have appeared at the former trial in the Circuit court of this

case. The record shows as to that former trial that the three tracts claimed by the plaintiff were found to belong to her, and that her ownership extended to the "low-"water mark" of Hyde lake. But it does not follow, after the new trial was taken that any facts then found, or suggested in the opinion of the court, should be imputed to, or added to, the record in this case. The counsel chooses to refer to statements of his Honor Judge Blodgett as to what appeared to his mind from the evidence as it had been presented before him. This should not be allowed to affect this case. It is of the same order of things as is the introduction into much of the brief in the present case of matter which pertains to another case before mentioned, including a reference to the brief of the counsel himself in that case. Yet because of such reference, deeming it proper to see what the counsel had said in his brief in the other case, a copy of that brief has been noticed, and a brief suggestion in regard to it should be made. This suggestion is to have reference to diagrams.

Much fault seems to have been found by the counsel with some illustrations given in appellant's brief; namely, to Diagram No. 3, at page 28 of appellant's brief, and Diagrams 4, 5 and 6 following pages 34 and 46 of appellant's brief. The diagram or outline sketch No. 3, does embrace territory not involved in the survey of 1834–5 nor covered by the two official plats given in the present record, these two plats being essentially one, so far as the lake in Illinois was surveyed in 1834 and 1874 respectively there being, in fact, no difference in the representation in either of those two plats of that part of the lake. But to give a clearer idea of expressions used in the special findings as to the residue of the lake and its connections this diagram was made up from maps open to the public.

The reasons for inserting the diagrams 4, 5 and 6 are similar in character, but there was an additional reason in this, that Defendant's Exhibit 4, on which the counsel relies so much, could by such diagrams be the more readily understood by such a comparison of the same with the statements in the special findings as to the level of the water in the lake, as influenced by fluctuation, the obstructions at the mouth of Wolf river, changes in the level of water in Lake Michigan, etc.

Although the premises suggested by the defendant's said exhibit were faulty, yet the result of them could be shown by the diagrams as sustaining the original survey. From the defendant's own showing, the substantial correctness of the survey thus appears.

The truthfulness of these diagrams 4, 5 and 6 is again shown substantially by the "Exhibit No. 4½," which appears in the brief of counsel in said foreign case, to wit: *Mitchell* v. *Smale*, page 8 of that brief. The tracing thereon of marsh lands on the lake side of the supposed meander line, and the spurs indicating the supposed ridge running from the supposed meander line on the upper part of the exhibit down to the word "McDaid," a distance of perhaps something like 220 rods southward from the tract represented as belonging to Mr. Mitchell, the plaintiff, and marsh space thereafter for quite a distance, and then spurs again on a space marked "Field," being Elm island or Fogli's place, and then marsh again for a space, and then a connection between said body of water and Wolf lake on the east, and after this a little spur and marsh land, etc., these features prove such diagrams in a great measure, because of correspondences, especially as at page 7 of the brief of counsel in the present case it is said that this Exhibit "No. 4½" is a "map covering the

"same territory *at a lower stage of water*." Substantially this Exhibit "No. 4½" would illustrate, if brought into this case, the correctness of said Exhibits 5 and 6 as to the thread-like character of the ridge, in respect to which so much is said by the counsel.

As has been heretofore said and shown, the special findings do not justify the statement of counsel that "at "the survey in 1835, there was a continuous body of land "running in a south-westerly and north-easterly direction "from the meander line run in that survey as the south "line of said fractional south-west quarter of section 20." (Defendant's Brief, 26.)

If that remark was intended to apply to this case, and if it was intended by it to intimate that the ridge divided the lake into two bodies at the time of the survey in 1835, then it is altogether wrong. The ambiguous character of the remark may possibly leave it to stand in some measure applicable to land in section 20, but it was much safer to make it ambiguous than to make it positive if it was intended to apply it to land in section 30.

At page 2 of the brief of counsel is a statement that "by mistake, either accidental or otherwise, the surveyor "in making the survey for the government, ran a meander line, thus omitting from the survey more than 1,000 "acres of land."

No such error or fraud was discovered in all the researches made in 1874, nor was it discovered in the trial court, and consequently no such fact was found, or could be found by the court. "He who lives in a glass house "should beware of throwing stones."

There is nothing to indicate that there was either error or fraud in the survey of 1834-5. There is nothing to

show that the state of things now existing is the same state of things as those which existed in 1834, nor that the surveyor departed from the line of duty in the matter at that time. The fraud is in the effort to take away the lake-bed, which the counsel must concede, and does in his brief partially concede, was upon the theory that what had been the lake, and was such at the time of the survey in 1834-5 had in 1874, from change of conditions, become to some extent, reclaimed land, in patches here and there within the limits of the lake. Upon that pretense the survey of 1874 was made, and the official plat of it again represented one body of water as before, and not two bodies.

If, by possibility, it may be imagined that the surveyor should have taken in a little more of the supposed ridge of land, it would not follow that his survey of the east fraction of the south-east quarter of section 30 should be affected. Or, if it could, by any reach of imagination under the findings, be supposed that acreage of that fraction should have been larger, it would not by any means follow that Mr. Holbrook would not be entitled to treat that fraction as extending to the lake. The special findings are explicitly to the effect that the body of water shown upon the plat of the survey of 1834–5 as a "navigable lake" was in fact meandered by the surveyor, and that the meander line *was run substantially upon the margin of that lake*, with but *one* exception. Besides this, the special findings incorporate the field notes, which are not contested. Those field notes show that the surveyor intersected this lake by the various section lines which he was required to run, and set posts at the intersecting points, and ran his meander line along the margin of the lake. All this is not contested. It is

incontestible. At that time (Transcript, 56), he noticed the outlet to the lake on its western side as being forty links wide, and having a rapid current. This is the outlet represented by diagrams one and two (Plaintiff's Brief), which outlet is referred to at page fifteen of the brief of counsel.

The counsel concedes, page 61, " *that it is difficult to furnish evidence as to where the line of water * * * was " when the meander line was run.*" (Defendant's Brief, 61.) Of course it is, yet according to this record the surveyor ran his meander line substantially upon the margin of the lake. The counsel further concedes that applying a rule which he proposes, to wit:

" That where the riparian rights exist the water's edge " at the time the purchaser from the government acquires " title, is the boundery line," then " so far as relates to " the water boundary on Hardin's fractions in the north " half of thirty, and the south half of nineteen, the plat " would seem to show that the water came up to the " meander line, and that the two coincided upon these " tracts." (Defendant's Brief, 62.) This being so, there is practically the same reason for supposing, even from Defendant's Exhibit 4, that as to the east fraction of the south-east quarter of section 30 " the water came up to " the meander line," for the elevations given on said exhibit between the open lake and said fraction, as the defendant would limit it, *are practically the same as the elevations shown between the meander line of the other two tracts and the open lake.* This is taking that exhibit into consideration again, though it is not necessary to look to it at all; and as it is represented in and by the brief of defendant's counsel, it seems to be quite untrustworthy. for the minus sign showing levels below datum is at times omitted in the copy given in the brief.

The position to which the counsel is forced is that the meander line was a bounary line (Defendant's Brief, 60), contrary to all the authorities on the subject, and contrary to his first point, in which he said: "The mere "fact that the meander line is designated upon the gov- "ernment plat as a meander line cannot be conclusive in "the matter." (Page 18 of his Brief.)

The statement just quoted is also in itself misleading, because it cannot be pretended that the meader line was placed upon the plat of the survey of 1834–5. So far from being placed there it is claimed, that when the survey of 1884 was made for the defendant that line was run from courses and distances given in the field notes of the survey of 1834 5.

Several cases are referred to by the learned counsel as supporting the theory that there was some land omitted in section 20, not in controversy here, in running the meander in 1834–5, to enable the surveyor general to make up the plat and ascertain the acreage, and by argument it is attempted to apply a like theory as to the east fraction of the south-east quarter of section 30. In making that claim the learned counsel cites Gould on "Waters," as laying down a proposition concerning meander lines as boundaries.

The proposition has no application to this case. The general form in which it is stated requires consideration of the special circumstances of the case; and it is not true that a patentee is to be deprived of riparian rights because the body of water was meandered, and there happens many years after his entry, to be a larger area or acreage of land than was estimated in the surveyor general's office as to the tract entered.

Besides the land omitted, must be "a considerable

"body * * * above the ordinary stage of the "water," etc. It must be "covered with vegetation and "timber," etc. And where must this all be? The circumstances are material, as applied to the case in hand. What is represented by the special findings as lying between the meander line of the east fraction of the south-east quarter of section 30, and what may be supposed to be the open lake, adopting somewhat the theories of the defendant, is not actually shown by those findings to be other than a part of the bed of the lake, having a growth of coarse swamp grass, ~~peculiar to~~ in the water, to (Rec. 58.) The finding in this regard is "the point at which to the south, the "open water of said lake ceases and marsh grass begins, "is several rods north of the south line of section 30," etc. (Transcript, 58.)

Now, the conditions suggested by Mr. Gould would not take away from Mr. Holbrook, who entered this land in 1838, the right of being a riparian proprietor, for his purchase was according to the official plat of the survey which had been made in 1834–5, and by that plat the land was bounded by the lake, and there is no evidence here that the plat was in this respect untrue, nor even that this swamp-grass had begun to grow at that time.

This being so, a brief examination of the cases on which the counsel of defendant relies, to wit: *Granger* v. *Swart*, 1 Woolworth, 90; *Lammers* v. *Nissen*, 4 Neb., 245; *Glenn* v. *Jeffery*, 75 Ia., 20; *Bissell* v. *Fletcher*, 19 Neb., 726; S. C., 43 N. W. Rep., 350; *Martin* v. *Carlin*, 19 Wis., 454, will show that they have no application to this case. The grounds of decision in those cases do not support the defendant in this case.

Take the cases in the order of their dates:

(1.) *Martin* v. *Carlin*. It was an admitted fact that

there was a mistake in meandering Rock river, and that the river was farther north and west than the government survey had located it in respect to the north-east fractional quarter of a certain section, so that to extend that quarter to the river a regular quarter-section line would be crossed. The question was, whether a strip of land lying in the north-east fractional quarter, south of the river and north of the east and west quarter section lines, belonged to lot 1 or to lot 2. The grants of both lots were from the Territory of Wisconsin, to which the general government had granted the section.

A majority of the court, admitting that the question was certainly not free from difficulty, inclined to the opinion that under the system of government surveys the quarter section line must control and fix the boundary of lot 2 on the north, and that because that line intervened south of the river, the land lying between that line and the river should go to lot 1, which was in the N. E. ¼, and such line was not to be crossed to reach the river, for it was argued that if a quarter section line was to be crossed, why not a township or section line? The court added: "They are all lines actually run by the surveyor, "or which may be run from ascertained monuments estab-"lished by him; and there is as much reason for saying "that the lot (the contending lot 2), crosses the town line "and extends to some natural object, as that it should "cross the quarter section for a like purpose."

The case has no application here as making a meander line a boundary, nor as limiting the boundary of the east fraction of the south-east quarter of section 30. It could only have application if it were necessary to extend boundary of this tract beyond the quarter section line either northwardly or westwardly.

(2.) *Granger* v. *Swart* is also entirely different from this case.

The reporter, Mr. Woolworth, gives a charge by Mr. Justice Miller to a jury in that case. The reporter's note states that the plaintiff's title was derived from an entry made subsequent to that under which the defendant claimed; that the government surveyor had run a meander line, and that before the defendant made his entry a considerable body of land was formed by accretions, which land was low and marshy, etc. It was left to the jury to determine whether, at the time of the defendant's entry, the land entered by him extended to and bordered upon, the meandered line, which his Honor said, *constituted the boundary of the lands described in the patents.* He further charged the jury that if between that line and the bank of Rock river and the shore of Lake Koshkonong, there was *at that time* a body of swamp or waste land, or flats upon which timber and grass grew, and horses and cattle could feed and hay be cut, then the patents under which the defendant claimed did not cover the land, but were confined to the actual limit of said meander line. The charge of his Honor further shows that the "meander "line was represented by the United States survey." (1st Woolworth, 90.)

For aught that appears in the report, the plat giving the meander line indicated in some way that such line did not entirely coincide with the river and lake respectively. The fact of there being a meander line represented on the map fully distinguishes the case from the present case; and the other circumstances stated by Mr. Justice Miller would also seem to distinguish it, for the rule applied by his Honor requiring a finding as to whether the new land existed or had been formed prior to the entry by the de-

fendant, or between the time of his entry and the time of the Government survey, is a distinction, because it does not appear here that any land claimed by the defendant had been formed in 1838, when John Holbrook made his entry, nor even that it had been formed in 1850, nor does it appear that it was land as distinguishable from the lake in 1885.

(3.) *Lammers* v. *Nissen*, seems to have been so similar in its facts that it followed said charge in *Granger* v. *Swart*, while presenting some other special circumstances. The court referred to the meander line as being designated on the plat as a meander line, and considered whether the land in controversy had been formed since the original survey of the line was made in 1858, and held that this was not so, but that the land in controversy, which was estimated at about 1,000 acres, lying between the meander line and the bank of the river, existed at the time the plaintiff made his entry, and was therefore subject to a subsequent special survey, which the Government made in 1869, under which the defendant claimed. The court found it to have been land in 1858, when the original survey was made; land covered with vegetation and a growth of young trees, 800 to 1,000 acres of it covered with a growth of cotton-wood and willows, etc., which the surveyor did not survey. He had run a line along a slough, treating that as a portion of the river, such slough extending, however, over only a part of the distance along the meander line.

The special facts of the case, and especially those showing that there was a meander line represented on the plats, and the surveyor's omission of so large a body of such land, would entirely distinguish that case from the present one.

If the plat, given at page 246 of 4 Neb., be observed, the line will be seen there to be a meander line.

(4.) *Bissell* v. *Fletcher*, was decided in the Supreme court of Nebraska in 1886. The court considered the case in most respects similar to *Lammers* v. *Nissen*, and said it was to be regarded as a question of evidence whether a meander line, of which there was some evidence, should be adopted as conclusively a boundary, and held that, "if when the entry of public land is made, the "bank of the river at an ordinary stage of water was in "fact where the meander line was represented by the "survey, and land has since been formed by accretions, "it will become the land of the person who has title to "the land immediately behind it." But the plaintiff did not claim that the land in question was an accretion; and the court affirmed a judgment in favor of the defendant.

The rehearing of the same case as reported in 43 N. W. Reporter, confirms the idea that because of a mistake made in the survey under which the plaintiff claimed a second survey, on which the defendant relied, was sustained. Whether the plaintiff purchased before the second survey, does not appear.

(5.) *Glenn* v. *Jeffrey* was so similar in respect to the general principle involved, and is so lacking in any element that would make it like the case now before the court, that it needs no special notice. A bayou, along which a meander line had been run, was taken for the Missouri river, and it was held that the plaintiff did not get by his entry, the land between the bayou and the river. This land, as is to be inferred, had been surveyed by the government as unsurveyed; but whether before or after the

entry by the plaintiff under the first survey does not appear.

The cases are unlike this case. They did not involve the principle involved here, and could not shake the decisions cited in plaintiff's brief as to the law of boundaries and as to meander lines not being boundaries in general, when not represented on the plat as such.

Respectfully submitted.

THOMAS DENT,
For Plaintiff in Error.

entry by the plaintiff under the first survey does not appear.

The cases are unlike this case. They did not involve the principle involved here, and could not shake the decisions cited in plaintiff's brief as to the law of boundaries and as to meander lines not being boundaries in general, when not represented on the plat as such.

Respectfully submitted.

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For Plaintiff in Error.

Office Supreme Court U. S.
FILED.
DEC 8 1890.
JAMES. H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

No. 161.

GERTRUDE H. HARDIN,
Plaintiff in Error,
vs.
CONRAD N. JORDAN,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF FOR THE PLAINTIFF IN ERROR.

THOMAS DENT,
FOR PLAINTIFF IN ERROR.

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BRIEF FOR THE PLAINTIFF IN ERROR.

This is an ejectment suit, in which Gertrude H. Hardin, the plaintiff in error, was plaintiff. It is a consolidation of four suits which were brought by her against sundry defendants in the Superior court of Cook county, in the State of Illinois. Conrad N. Jordan, the defendant in error, was substituted for the original defendants, and the causes were then removed, on his petition, to the Circuit court of the United States for the Northern district of Illinois, in which court an order was entered on the 17th of January, 1883, consolidating the various causes, and directing that they should proceed as one case. (Printed Transcript, 31.)

It was tried in the Circuit court before Hon. Walter

Q. Gresham, Circuit Judge, a stipulation in writing waiving a jury having been filed. (Transcript, 48, 52.)

The case is brought here on special findings (Transcript, 52), and also on a bill of exceptions taken by the plaintiff. (Transcript, 61.)

The case presents a question of boundaries and of riparian rights and ownership. The lands involved are on and within the limits of a small non-navigable inland lake. The lands on its borders were surveyed for the government in 1834, and were sold and granted according to the official plat of that survey. The plaintiff as the owner of three fractional subdivisions bounded by said plat upon the lake, claimed riparian ownership to the center of the lake. The defendant asserted ownership over the lake by virtue of a survey thereof made under the direction of the Commissioner of the General Land Office in 1874, claiming that the whole lake was reserved because of a line of meander by courses and distances along or near its margin, having been mentioned in the field notes of the survey of 1834. The judgment limited two of the plaintiff's fractions, those lying on the west side of the lake, to low water mark, and as to the other fraction, lying on the south side of the lake, denied it a lake frontage, and restricted it to said supposed meander line. The effect of the judgment was to sustain the defendant's claim of ownership of the entire lake, and also of all but 2.04 acres of said last named fraction because of treating, as to it, the meander line of the survey of 1834 as a boundary.

In one count of the declaration the plaintiff in error claimed title to the South East fractional quarter of section nineteen (19), the North East fractional quarter of section thirty (30), and the East fraction of the South East

quarter of section thirty (30), Township thirty-seven (37) North, Range fifteen (15) East, "together with the accre- "tions and relictions forming a part thereof." (Transcript, 38, 39.) To this count, being the only one at the time, the defendant filed a demurrer. The order of the Circuit court on the demurrer, Hon. Romanzo Bunn, District Judge, presiding, was, "that said amended "declaration (referring to said count) is held good to "recover the land definitely described by government "description, but not to recover any relictions or accre- "tions appurtenant thereto, or belonging therewith, "lying outside of such government descriptions." (Transcript, 40.) The order of the court gave the defendant time to plead to the said declaration. Two pleas were filed. 1. That the defendant was not guilty of withholding the premises claimed by the plaintiff, as above described by government descriptions. 2. That at the time of the commencement of the suit he was not in possession of the premises thus described, and did not claim title thereto, or interest therein, or any part thereof. (Transcript, 42–3.) A trial was had in April, 1883, and resulted in a judgment for the plaintiff for "all the lands "lying between the meander lines" of the tracts as above described by the government descriptions, "and the low "water mark of Hyde Lake." (Transcript, 44.) By stipulation between the parties this judgment was set aside and vacated, and a new trial was granted as if under the statute. (Transcript, 45–6.) Afterwards an additional count in the declaration was filed by the plaintiff. In this additional count the land is described by government descriptions as follows, to wit: The South East quarter of Section nineteen, and the North East quarter of Section thirty, and the South East quarter of Section thirty,

all of Town. thirty-seven North, of Range fifteen East of 3d P. M., of said Cook county, State of Illinois (S. E. ¼ S. 19, N. E. ¼ Sec. 30, and S. E. ¼ of Sec. 30, T. 37 N., R. 15), and the following further descriptive words are added: "With all accretions, alluvions and "relictions, to wit: all the land lying between the west "boundary line of said south-east quarter of section nine- "teen (19), and the west line of said north-east quarter of "said section thirty (30), and the middle line of the per- "manent water of the lake east of said line, sometimes "designated and known as 'Navigable Lake,' and some- "times as 'Wolf Lake,' and also all the lands lying be- "tween the sectional lines of said south-east quarter of said "section thirty (30) and said lake." (Transcript, 46–7.)

To this additional count the defendant filed two pleas, which were the same in substance as his pleas to the first count, namely: 1. Not guilty of withholding the premises above described by government descriptions. 2. That he was not in possession of so much of said premises as are described by such government descriptions, nor of any part thereof, and did not claim title thereto or interest therein. (Transcript, 47–8.)

The judgment of the Circuit court refers to the special findings of facts. It is that the defendant is not guilty as to the east fraction of the south-east quarter of section thirty (30); that the plaintiff is seized in fee of the south-east fractional quarter of section nineteen (19) and the north-east fractional quarter of section thirty (30); that by the terms of the patent of said lands to John Holbrook, the plaintiff's ancestor, the grant of said last described lands was bounded by and extends to a body of water along the easterly line shown on the government map or plat of the government survey as a "navi-

gable lake"; that plaintiff is entitled to claim to low water as her eastern boundary of said lands described; that defendant, as to the parts of said last described lands lying between the meander line run in the government survey and the margin of said lake at low water, is guilty of unlawfully withholding the possession thereof from the plaintiff; * * * and that as to the residue of the lands described in the declaration defendant is not guilty. (Transcript, 60.)

No opinion was filed by the trial judge.

The SPECIAL FINDINGS state: 1. "That plaintiff is seized in fee of the South East fractional quarter of Section nineteen (19), the North East fractional quarter and the East fraction of the South East fractional quarter of Section thirty (30)," &c., "as per patent from the United States of America to John Holbrook, plaintiff's ancestor, dated May 20, 1841, in which patent the grant of said lands is recited to be 'according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general;' and that said patent was based upon an entry by said John Holbrook, made in the year 1838, at the United States Land Office in Chicago, Illinois."

Item 2 of the special findings shows that the government survey of lands in said fractional township was made in the years 1834 and 1835, and sets out the field notes of such survey.

Item 3 of such findings gives a copy of the plat made from said survey and field notes for the Local Land Office, the Surveyor General's Office and the General Land Office. (See plat marked page 118 of Record.)

Of this plat we add: It represents a body of water as adjoining the tracts of land in question, designating it "Navigable Lake." It is shown as extending into Indiana. The portion of it in that State is not given in this official plat. Such plat shows that the south-east fractional quarter of section nineteen (19) was estimated as containing 79.11 acres; that the north-east fractional quarter of section thirty (30) contained 28.74 acres, and that the east fraction of the south-east fractional quarter of section thirty (30) contained 2.04 acres.

The Illinois portion of the lake is shown as having an area of some 1,300 acres. The township was fractional by reason of the township next west coming within less than two miles of the east line of Illinois, and also because the Indian Boundary line intervenes on the north-west and Lake Michigan on the north-east.

4. The fourth article in the special findings states "that the body of water shown upon the plat was, in fact, meandered by the surveyor, the meander line being run substantially on the margin of said lake as shown by said plat, save that said line was carried across a certain ridge extending in a southerly direction from the centre of fractional Section 20 towards the point of land shown in the plat as comprising said East fraction of the South East quarter of Section 30." *Then intervenes in said article a more particular description of the ridge, showing how far it juts into the water represented on the official plat as "Navigable Lake,"* etc.

The findings here state that the western part of the lake has, for many years, been known as Hyde Lake, in ordinary speech, while the Eastern part, which is the larger portion, running into Indiana, has been currently known as Wolf Lake.

This article in the findings concludes with this statement:

"That the physical conditions of the land and water are substantially what they were at the time of the original survey, and that the lake is not navigable. At the time of said government survey (that of 1834–5) there was a natural outlet for said lake towards the north-east into Lake Michigan through Wolf river, said river being about one and one-half miles long and from six to fourteen feet in depth; but such outlet was and has continued to be subject to interruption by the formation of a sand-bar across the mouth thereof, upon the shore of Lake Michigan. There was also an outlet from the westerly portion of said lake into the Calumet river, shown on said plat as Little Kalamick, said outlet into the Calumet river running in a westerly direction through the fractional north one-half of said section 30 to its connection with said Calumet river."

"6. The level of water in said lake or lakes is subject to fluctuations alike from the operation of the change of the level of Lake Michigan from storms, winds, etc., and also from the operation of rains, thaws, evaporation, &c.; but said 'lake' or lakes is or are occupied by permanent water, and substantially the entire bottom thereof is below the mean level of Lake Michi-

gan, and the greater portion of it is below extreme low water in said Lake Michigan, so that said 'lake' or lakes never become entirely dry, nor has any considerable portion thereof within its margin, as shown by the said government plat, ever been fit for cultivation, except as to Elm Island and said ridge hereinabove described."

"7. That at times of high water, however produced, the water in said lake or lakes extends to and beyond the limits that it occupied at the times of said government survey.

"That a level of Lake Michigan has been adopted in all surveys in Cook county called datum; that the extreme rise and fall of Lake Michigan is from five feet above datum to one foot below datum; that the average level of water in Lake Michigan is about 1.8 feet above datum.

"That the level of water in said lake or lakes when the same reaches the level existing at the time of the government survey of 1834 and 1835 is 2.2 feet above datum and .4 (4-10) foot above the level of Lake Michigan."

In respect to adverse possession by the defendant, the special findings state as follows:

"8. That defendant and those under whom defendant claimed, constituting the defendants in said original causes which were consolidated into the present case, entered into and took possession of the lands described in the plaintiff's declaration, except so much of the south-east fractional ¼ of section 19, the north-east fractional ¼ of section 30, and the east fraction of the south-east fractional ¼ of said section 30 as lay beyond and outside of the meander line as run upon the margin of said lake by said government survey, and defendant was so in possession at the time of said suit and trial thereof."

The evidence offered by the defendant as set out in the bill of exceptions, which was taken to preserve the plaintiff's objections thereto, consisted of three general items:

1. A map, Defendant's Exhibit 4, page 130, purporting to show the topography in part of the lake as per a private survey made November 4, 1884, some part of the representations upon which may be supposed to have influenced the trial judge in making up the special findings, especially in describing said ridge, though such special findings do not fully agree with this map. (Transcript 61, and Map; Rec., 130.)

2. The plat of a survey of 1874, by Alexander Wolcott, which was introduced as official, and which as to the lake outlines and dimensions is the same as the official plat made from the survey of 1834; and also the patents and deeds under which the defendant claimed title to the original lake-bed so surveyed by said Wolcott. (Transcript 61–2, and Map; Rec., 132.)

3. A decision of Commissioner Williamson of the General Land Office February 12, 1878, declining to review the approval by Commissioner S. S. Burdett, his predecessor in office, of the said survey of the lake-bed in 1874 (Transcript, 79), and a decision by Mr. Secretary Schurz, of the Department of the Interior, May 4, 1880, affirming said decision of Commissioner Williamson, on the ground of the credit or responsibility for such approval being that of a prior administration, to wit: that of President Grant (Transcript, 92); and also a letter from acting Secretary Bell of the same department, May 16, 1881, to the Commissioner of the General Land Office, refusing a hearing to the plaintiff because she did not appeal from the order of Commissioner Burdett of December 31, 1874, approving the survey by Alex. Wolcott of the lake bed. (Transcript, 98.)

The report of Mr. Secretary Schurz, so put in evidence by the defendant, shows that the tracts surveyed in 1834-5 were disposed of long prior to the survey of 1874. (Printed Transcript, 92.) At the latter date, therefore, the United States had no land adjoining the lake. This evidence also included an attempt to show, in connection with a map, (Defendant's Exhibit 4, Rec., 130), the topography of the lake on the 4th of November, 1884, and a tracing from a survey, at that time, by courses and distances taken from the field notes of the survey of 1834, of a supposed meander of the Illinois portion of the lake.

As to said map, it may be remarked, in passing, that as to the lake's bounds, it differs very radically from the official plat of the survey of 1834, and also from the plat made up in the General Land Office upon the survey of the lake in 1874. (Rec., 132.)

To state the defendant's evidence somewhat more in detail as to official action:

On the 8th of September, 1874, Commissioner Burdett, of the general land-office, upon petition of Alice A. Condit and others, through whom the defendant claims, issued instructions to Alexander Wolcott, under which said Wolcott, being paid out of a fund raised by the petitioners, is supposed to have surveyed lines, extending those of the survey of 1834–5 through the lake.

His survey was approved by Commissioner Burdett, December 31, 1874. (Transcript 79, 93; plat of the survey, Rec., 132.) Defendant's evidence, Transcript 92, shows that the survey was under a circular from said Commissioner, dated July 13, 1874. The Commissioner directed a hearing of evidence in the land office at Springfield, Illiinois, in regard to divers claims as to the lake and lake bed so surveyed. (Transcript 79, 80.) A report was transmitted from the local land office to the General Land Office, and on the 12th of February, 1878, Commissioner J. A. Williamson, of that office, decided to sustain the survey of 1874. The ground of his decision is stated as follows:

"The riparian claims of Gertrude H. Hardin and Horatio B. DeWitt have been denied by the action of this office, in ordering and approving the survey of the lake bed, thus treating the land as belonging to the United States." (Printed Transcript, 82.)

The Secretary of the Interior, Hon. Carl Schurz then be-

ing at the head of that department, affirmed the decision of Commissioner Williamson. (*Ib.*, 93.) The reason given for the affirmance was in substance that Alexander Wolcott's survey was approved by Mr. Burdett, as Commissioner of the General Land Office, and then became an accomplished act; that it involved a decision that the land belonged to the United States, and that Commissioner Williamson could not, upon the case made, review the action of the former incumbent of his office. (*Ib.*, 93.) On the 16th of May, 1881, Acting Secretary Bell of the Department of the Interior refused a rehearing of the matter of such appeal to that department, and held in substance that the plaintiff should have appealed from the decision of Commissioner Burdett approving of the survey so made by Alexander Wolcott, and was concluded so far as the Department of the Interior was concerned because of not having so appealed; that there was no appeal from "the "head of a department to his successor in office;" that Mrs. Hardin had her remedy in the courts; and that if the survey made under Commissioner Burdett's direction was illegal and unauthorized, as alleged, the courts in a proper case could so declare, etc. (Printed Transcript, 98–101.)

From the plat offered by the defendant as the official plat of the survey so made by Alexander Wolcott (Rec., 132), it would seem that Commissioner Burdett, acting as *ex officio* Surveyor General, having received a report of the survey by Alexander Wolcott in 1874, adopted and used the plat which was made by the surveyor general after the survey of 1834, and merely extended lines through the lake to mark in it new subdivisions by lots and other modes of designation, but showing no meander line at lake borders.

In 1881 patents were issued for the entire lake bed, under which patents the defendant claimed title.

All the testimony so received on behalf of the defendant was objected to by the plaintiff, and exceptions were duly preserved.

A careful reading of the record will show that the evidence received on the part of the defendant affected the special findings, and perhaps the judgment also, in various particulars.

Did the United States in selling to John Holbrook reserve to itself as a proprietor the lake bed? Was such reservation the result of the bare fact that John A. Clark, the deputy surveyor, had, while surveying this township for the government in 1834–5, stated in his field notes the courses and distances traversed in running around the margin of the lake, although no meander line was marked on the official plat by which sales were made? After the sale by the government of the lands surveyed and platted as being on the lake borders, and after issuing patents for them "according to the official plat," could the government deny even riparian rights to the patentees of such lands represented on the plat as bordering on and extending to a lake marked on the plat as a "navigable lake?" Could the government withdraw the lake, and the lake bed also, on the pretexts set up as an excuse for the survey of 1874?

The facts as found entitled the plaintiff to a judgment for all the lands claimed, and did not support the judgment for the defendant restricting the plaintiff to low water as to two parcels and to the supposed meander line as to the other parcel.

Assignment of Errors.

First. The facts as found by the Circuit Court in the special findings did not warrant the judgment denying to the plaintiff the rights of a riparian proprietor, nor did they warrant the court in denying judgment for the plaintiff as to the East fraction of the south-east quarter of section thirty (30). The special findings (transcript, 52–9,) entitled the plaintiff to the full rights of a riparian proprietor, not only as to the two parcels first mentioned in said special findings, (transcript, 52,) but as to the third parcel; and the claim of the defendant under the survey of 1874, and the patents issued thereon, should have been held to be insufficient as a defense as to either of such parcels.

Second. Said special findings are not sufficient to support the judgment of the court in limiting the plaintiff as to any of the parcels to low water on the lake represented on the plat at page 118 of record, which lake is therein designated as "Navigable Lake," but is in fact found to be non-navigable.

Third. Said special findings are not sufficient to support the judgment of the court in respect to the east fraction of the south-east quarter of section 30. (Transcript, 59, 60.)

Fourth. The Circuit court erred in the admission of evidence on the part of the defendant by which the special findings and judgment were influenced or affected to the prejudice of the plaintiff, of the substance of which evidence the following specifications are made:

Specification 1. The plat or diagram marked page

130 in the record, and the testimony tending to show the physical and topographical features of the lake and lands at the date of a supposed survey November 4, 1884. (See printed transcript, 61.)

The evidence here objected to includes all that was received under the attempt of the defendant "to show the "location of the meander line run by the government "surveyor in the original survey of the lands in question." (Transcript., 61.)

The objection is also to all the evidence offered in connection with such map to show the physical features of the lake bed or lands represented on the official plat according to which the lands were patented to John Holbrook.

Specification 2. The plat or map of the survey of the bed of Wolf lake by Alexander Wolcott in 1874 for the Government Land Department. (See printed transcript, 61, and diagram marked page 132.)

Also, the patents and deeds under which defendant claims the supposed lake bed lands.

The substance of this evidence was that it was to support a claim on the part of the United States in 1874 and thereafter of a right to treat the lake bed, and generally the territory within a certain supposed meander line, as if reserved to the United States, and subject to sale and survey as public lands, and thereby to support the claim of defendant Jordan to the territory and riparian or other rights within such supposed meander line.

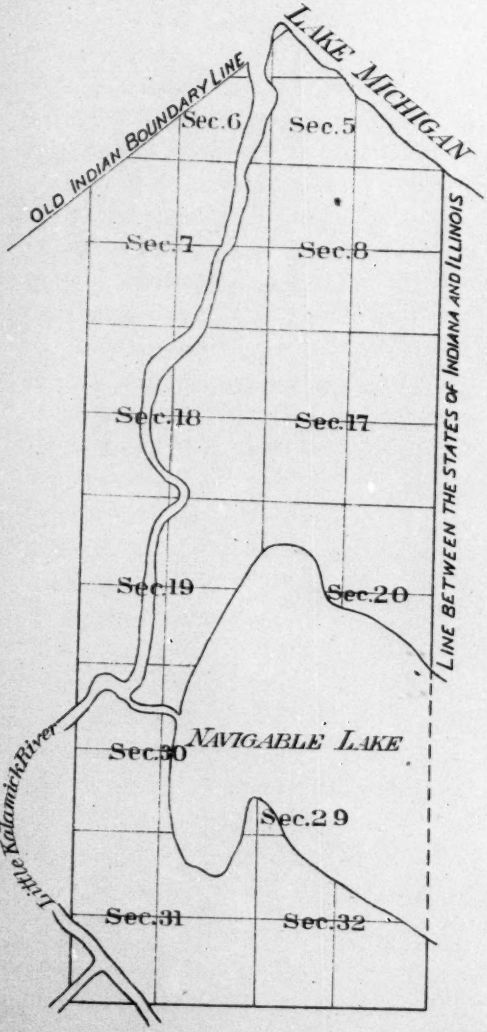
Specification 3. In admitting the transcript embracing the decision or decisions of the Commissioner of the General Land Office, and showing the correspondence and rulings of the Department of the Interior in reference to

the said survey of 1874. (See Transcript, pp. 79–102.) The substance of the evidence was that the same was in support of the theory that the defendant's claim of title under the survey was strengthened, or that of the plaintiff was weakened or overthrown, by the approval by Commissioner Burdett of the survey of 1874, and the consequent claim of a basis for the sale by the government of the lake bed lands, set up by the defendant adversely to the plaintiff; such evidence including also certain decisions or proceedings in the General Land Office and the Department of the Interior, as likewise tending to support the action of the General Land Office as to the survey of 1874 and the sale thereunder, and to impair plaintiff's rights in respect to lands covered by such survey; whereas, such proceedings could not, nor could such claims, in anywise affect the rights of the plaintiff under the title vested in her through the patents to her ancestor, John Holbrook.

FIFTH. That under the special findings the judgment ought to have been for the plaintiff, as to all the lands described in the declaration.

Diagram No. 1.

Outline of official plat of the Fractional Township 37 North, Range 15 East, as per government survey of 1834–5.



Plaiatiff's lands are S. E. fractional ¼ Sec. 19; N. E. fractional ¼ Sec. 30; East fraction S. E. ¼ Sec. 30.

Brief of the Argument

May it please the Court:

I.

THE THREE FRACTIONAL SUBDIVISIONS TO WHICH PLAINTIFF SHOWED TITLE, WERE BOUNDED BY THE LAKE. *The patent granted the same to John Holbrook, "according to the official plat of the survey," and this grant was entitled to like effect as to each tract in respect to the lake being a boundary.*

In the year 1838, John Holbrook, plaintiff's ancestor, entered three fractional tracts of land, each of which was represented on the official plat in the local and General Land Offices as bordering on "Navigable Lake." The township in which the lands were situated appeared from such plat to be fractional, in part because of the intervention of said lake. The entry is indicated on the plat (Rec., 118) by the number 4,958 in red figures on each of said three tracts, going to show that the tracts were all entered together. A patent for the same was issued to said Holbrook on the 20th of May, 1841. It recited that said lands were granted "according to the "official plat of the survey of said lands returned to the "General Land Office by the Surveyor General." (Printed Transcript, 52.) The lands in this township (it being 37 north, range 15 east) are specially found to have been surveyed in 1834–5. The township itself is now a part of the city of Chicago.

For an outline plat of said fractional township, as per said surveys, see diagram No. 1, annexed.

The controversy is predicated upon a claim of the lake bed by the defendant, denying to the heir of Mr. Holbrook any lake shore rights. This adverse claim depends upon a survey of the lake bed in 1874 by Alexander Wolcott, under the direction of Commissioner S. S. Burdett, of the General Land Office. The defendant's evidence as to official action in the General Land Office and in the Department of the Interior relating to such survey of 1874 (Transcript, 79–97), shows that it was on the theory that the survey of 1834–5 represented a portion of the township as embracing a navigable lake (*ib.*, 92), and that it appeared in 1874 that the waters of the lake had receded or evaporated (*ib.*, 79, 92), leaving within the unsurveyed area dry land, fit for agricultural purposes (*ib.*, 92). The same evidence is to the effect that the fact of the existence of such land within the limits of the lake was brought to the notice of the General Land Office by Alice A. Condit, Franklin A. Cleaveland, Chester B. Rushmore and George A. Rowe in applying on the 19th of August, 1874, for a survey of "Wolf Lake bed." Such evidence for the defendant is likewise to the effect that Commissioner Williamson concluded that the greater part, if not all, of such land "came into existence some "time subsequent to 1850 and prior to the survey in 1874." (Transcript, 81.)

We shall controvert the right of Commissioner Burdett to order a survey of the lake bed, and shall draw in question the action taken in that regard.

For the present we note a few references to late action in the General Land Office in like matters, or showing rulings enforcing the views to be stated herein.

A decision by Secretary Lamar, of date July 12, 1887, *in the matter of G. W. Holland*, Vol. 6 of Decisions of

General Land Office, etc., page 20, says: "Since 1877 "it has been the policy of the department to refuse to "survey the beds of meandered lakes, for the "reason set forth in the report of the Commissioner of "the General Land Office for 1877. * * * Besides I "am not satisfied that the bed of this lake" (referring to an alleged "dried up lake" in Minnesota), "does not "inure to the owners of the adjacent tracts upon the "principle of accretion, as ruled in *Boorman* v. *Sunnuchs*, "42 Wis., 233, and in *Forsyth* v. *Smale*, 7 Biss., 201."

In the matter of James H. May, Vol. 3 of Decisions of Department of the Interior, pp. 200, 201, Acting Commissioner Harrison, November 28, 1884, made reference to *Railroad* v. *Schurmeier*, 7 Wall., 272, as an authority to the effect that "When public lands border upon lakes and rivers "meander lines are run as means of ascertaining the quantity in the fraction subject to sale, and not as a "boundary of the tracts, the particular lake being treated as the great natural object, etc;" and a note refers to a decision by Mr. Secretary Teller *in the matter of Reuben Richardson*, which applied to a lake in Indiana.

The decision of Secretary Teller, above mentioned, is set forth more at large in *Vol. 2 of Copp's Land Owner*, 1884 to 1885, at pages 284, 285.

The general course of reasoning adopted in the decisions just now noted is fully embodied in a letter of instructions from Secretary Vilas under date of February 27, 1888. The same letter suggests cogent reasons why the water course and not the meander line should be taken as a boundary.

For said letter see *matter of James Hemphill*, Vol. 6, Decisions of the Department of the Interior, etc., from July 1, 1887, to June 20, 1888, page 455, *et seq.*

The plat offered by the defendant to show the survey of the lake bed so made by Alexander Wolcott in 1874 (see defendant's "Exhibit 5," Rec., 132) represents the lake as it is represented in the official plat of the survey of 1834, with a difference that, to indicate the survey by Alexander Wolcott, lines to mark subdivisions into quarter sections and smaller subdivisions are extended through the lake north and south, and east and west, but the lake, in both plats alike, is designated as "Navigable "Lake."

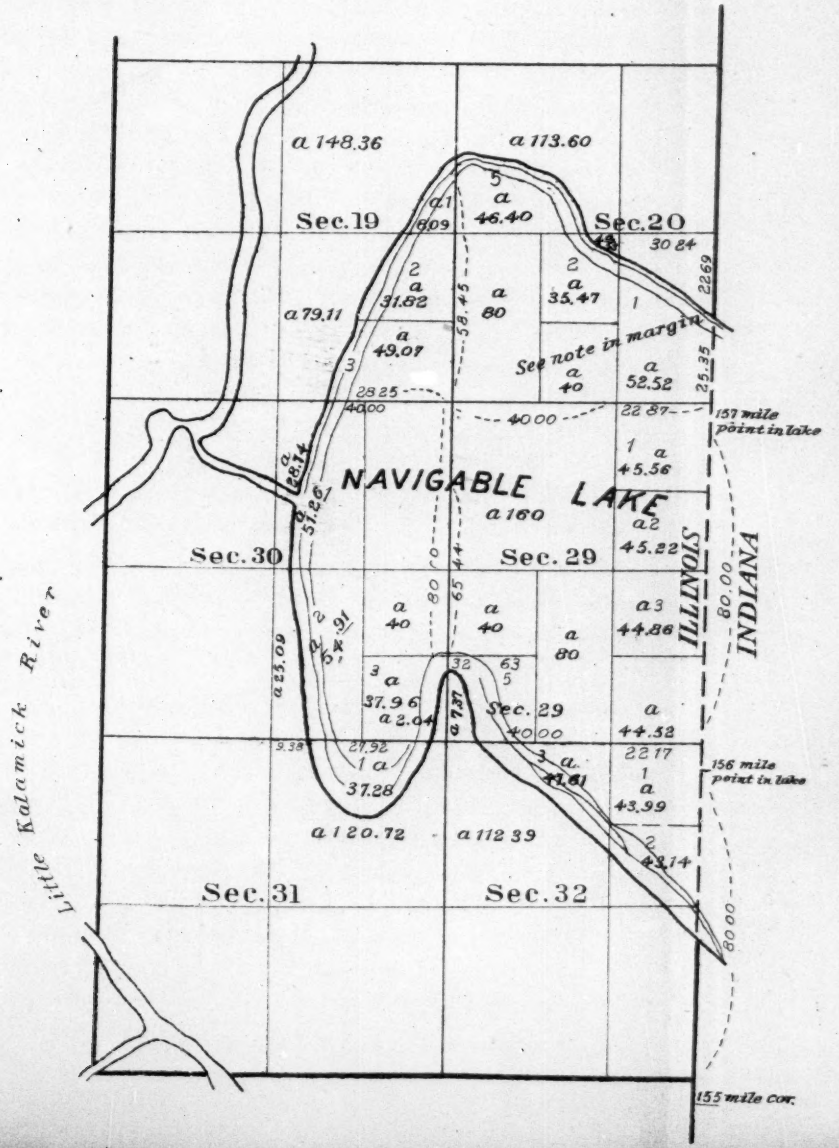
For a sketch of the official plat of the survey of 1874, extending lines through the lake, see Diagram No. 2, annexed.

We claim that the special findings did not justify the judgment limiting us to low water as to two of the tracts, and that that phrase in the judgment is too indefinite in view of the claims made by the defendant, and his possession of the lake bed; and it is to be observed as to the third tract, the east fraction of the south-east quarter of section thirty (30), that judgment in our favor was refused, although the findings showed title in us, and adverse possession the same in respect to the lake as in respect to the other tracts. Such special findings state as to this tract, as a conclusion of law, that "plaintiff was bound by "the meander line run by the United States surveyor, and "not entitled to claim the lake as her boundary." (Transcript, 59.) This conclusion of law is not supported by the facts as found. Such facts entitled us to judgment as to all the tracts alike, and to such rights in respect to the lake and lake bed as arise from such a grant as was made to John Holbrook of the lands on the lake.

The patents under which the defendant claims are

No. 2.

Outline of official plat of survey of 1874, by Alexander Wolcott, of the lake bed.



based upon, and are governed by, the plat of the survey of 1874. That plat shows the lake bed apportioned into subdivisions, those next to the shore being fractional and called lots. Such lots have for one of their boundaries the shore line of the lake as shown on the plat of the original survey of 1834–5. The plat of the survey of 1874 does not give any meander line of the lake. It adopts the outline of the lake as given in the plat of the survey of 1834. The plat of the survey of 1874 is therefore inconsistent with the adoption of any other than the lake shore line as a boundary. Both in the plat of the survey of 1834 and in that of 1874, the lake being alike in each, it is the lake which bounds the east fraction of the south-east quarter of Section 30 as well as the other fractions. Hence, the defendant could not rightfully, according to the plat of the supposed official survey of 1874, under which the defendant claims, exclude the plaintiff from the lake as to this fraction. This leads directly also to this result:

1. That the junior patents are void so far as they attempt to cover land between the lake and the supposed meander of the same which was made by John A. Clark in 1834.

2. And confessedly, the survey of 1874, according to the defendant's evidence, was a survey of the lake as it was in 1834–5; and inasmuch as the special findings show (see Transcript, 55, 56, 57) that the surveyor in 1834 ran the meander line along the margin of the lake, it would follow that if such margin receded, the plaintiff's land would still, under the principles under which she was found to be entitled to go to low water in the case of two of the fractions involved in this case, be entitled to go to low water as to the other fraction as well, the boundary line

in this regard following as to all the fractions the receding waters. This shows, as in a mirror, the invalidity of the junior patents. There is an underlying principle: To limit a shore owner upon a non-navigable lake to low water is to put the title to the bed somewhere. In whom is it supposed to be vested? Surely not in the State, which would need a grant to give it proprietorship of private waters. Nor could sovereignty and title remain in the United States after the sale of the lands on the lake; and acts of sovereignty cannot, in general, be exercised by the United States over territory which is held by private ownership within the domain of a State. Not being navigable water, this lake was a private water, and the riparian proprietors held it subject to proper state regulation alone, if the State should attempt to regulate the right of fishery and other aquatic privileges.

Following the principles upon which the learned judge in the trial court held that as to two fractions we were entitled to go to low water, the junior patents would also be void, because of uncertainty of boundaries. What is the definition of low water in the case of a lake so fluctuating as this lake appears to be from the special findings? What certainty is there for the drawing of a line as a boundary between shore and lake owners? Is it to be the shifting line incident to a body of water falling and rising so irregularly as appears to be the case with this lake? Must it not follow that the junior patents are in the nature of the case void, and that the finding that two of our fractions should go but to low water mark, falls short of the certainty which is sought by applying the principles of the common law? The rights of plaintiff as a shore proprietor, in respect to fishing, the taking of ice, etc., would have been paramount to those of defend-

ant, if the lake had been navigable, and were even more clearly paramount in respect to a non-navigable lake.

Put the patent and the official plat together, and it appears that as to these tracts we are entitled to full riparian rights, not limited to low water line, and are neither to be excluded from the lake, nor limited by the supposed meander of the lake in the original survey in 1834-5.

The theory of Commissioner Burdett that this was a meandered lake is not sufficient. It was necessary for the defendant to show that the meander line was a fixed boundary reserving to the United States lake and lands alike so far as protruding a hair's breadth beyond the meander. It was also necessary to show that the United States specially reserved the lake when it sold the lands on its border. This the defendant failed to do; and it would have been singular if it could have been done.

The official plat governs, because the lands were granted according to it. Patent and plat go together as if one document, and in neither of them is any reservation by the United States of the lake bed or of rights to accrue through accretions, alluvion or reliction. Nor does the plat show or represent such meandered line. It gives a simple outline of the lake, but not by courses and distances.

A copy of the plat which was made up for the local Land office, the Surveyor General's office, and the General Land Office, from the survey of 1834, is shown in said special findings. (Plaintiff's "Exhibit B," Rec., p. 118.)

The course pursued as to the making of such plat is presumed to have been the usual one, which is as follows:

EXTRACT FROM PRINTED MANUAL OF INSTRUCTIONS TO SURVEYORS.

"Upon the return of surveys to the Surveyor General consisting of original field notes and a topographical sketch of the country surveyed, the work is examined, and if on applying the usual tests, it is found to be correctly executed, the Surveyor General approves the field notes; whereupon the draughtsman protracts the same on township plats in triplicate, and, after approving the plats, the Surveyor General files the original in his office, to be ultimately delivered to state authorities; the duplicate is sent to the local land office to enable the register and receiver of public lands to dispose of the lands embraced in the several townships, and the triplicate he transmits to the Commissioner of the General Land Office for the information of the government."

It does not comport with the acts of Congress in regard to the survey of the public lands to require purchasers of lands represented on the official plat as bordering on lakes to have the lines resurveyed to see whether a lake was, or has come to be, bounded otherwise, here and there, than as represented on the plat.

The line drawn on the official plat in this instance to represent the lake was intended to represent its general configuration; not its sinuosities, nor any such precision as to courses and distances along the lake border as pertained to the straight lines, north and south, east and west, extended from section corners. The straight lines upon cardinal points of the compass were extended to the lake as the plat represented it. This being so, and the field notes showing that posts were set on the margin of the lake at section lines, is it to be presumed to be the policy of Congress to have the official plat, by which the lands were sold, construed away in order to have the United States retain a proprietary interest in lake beds or sinuosities?

Take Section 2,396 of Rev. Stat. U. S. It says:

"Clause 1. The boundaries and contents of the several sections, half sections and quarter sections of the public lands shall be ascertained in conformity with the following principles:
* * *

Clause 2. The boundary lines actually run and marked in the survey returned by the surveyor general shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines as returned shall be held and considered as the true length thereof. And the boundary lines which have not been actually run and marked shall be ascertained by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the water course, Indian boundary line or other external boundary of such fractional townships."

This section would give full extension to the lake as to each of our tracts.

That these lands were bounded by the lake, and not by a meander line more or less distant or variant from the lake, appears from various considerations.

The effect of the patent to John Holbrook granting according to the official plat, etc.

The patent, as will not be forgotten, granted him these lands according to the official plat of the survey of the same; and when we notice the plat we find that each tract has the lake as one of its boundaries. Is there, then, any reason for putting aside the plat in respect to one of the three tracts covered by the entry and patent?

How could a discrimination be made against one tract? It was not made by the patent; for that instrument granted these three tracts together, by the usual general description, "according to the official plat," etc. (Transcript, 52.) Thus all the tracts had a lake boundary. Nothing

can be found in the general findings to justify the discrimination made against us in the judgment in respect to one tract.

The field notes are not adverse to us.

Deputy surveyor Clark had completed his work when he ran the section lines, not being required under the acts of Congress to do more except to give data from which areas could be made up as to subdivisions abutting the lake, and this he did by giving courses and distances around the lake.

Let us notice more in detail the work which he did, as shown by the field notes.

The first thing that he did was to set a post for a corner to sections 29, 30, 31 and 32. He then ran west two and eighty-four hundredths (2.84) chains, and intersected the south-easterly margin of this lake, calling it a "navigable lake," and there set a post. He then sent his flagman around the southern extremity of the lake, and caused a flag to be set on the opposite side of the lake, on the line between sections 30 and 31, and ascertained the distance across the lake, namely, twenty-seven and seventy-eight hundredths (27.78) chains, and he there set a post. He extended the line to the west line of the Township. Beginning again at the corner so first established by him, the corner of sections 29, 30, 31 and 32, he ran East five and ninety-seven hundredths (5.97) chains, (Transcript, 53,) and there intersected the south-west side of said lake, again calling it a "navigable lake," and there set a post. He then began again at the corner which he first fixed, to wit: said corner between sections 29, 30, 31 and 32, and thence ran North, on the line between sections 29 and 30, fourteen and fifty hun-

dredths (14.50) chains, and intersected the "bank "of lake" and there set a post, and referred to the bearings or witness trees, and added, "as the remainder of "this line is in the lake, I commence at the corner to "sections 24 and 25" in the township immediately West. Passing with him from that corner (Transcript, 53), we find that he ran thence East between sections 19 and 30, crossing the Little Kalamick river, etc., and a road, and at fifty-one and seventy-five hundredths (51.75) chains from said starting point, intersected the West side of the lake, again calling it "navigable lake," and there set a post for the corner to fractional sections 19 and 30. He next commenced at the corner of sections 13 and 24 in the said township next West, and extending his line East, we find that he did not strike the lake in going to the Indiana line. Beginning again at the corner of sections 17, 18, 19 and 20 in this township, he ran South twenty-two chains, and there intersected the North-Westerly margin of the lake, and set a post. (Printed Transcript, 54.) *He had then established all the boundary lines required to be established by him, the lake being one of the same.* He next started out to give particulars from which the acreage of lake shore subdivisions could be computed. So beginning at a certain corner on the State line (Transcript 55), he went around the entire Illinois portion of the lake, stating courses and distances as he did so, until he again reached "the Illinois and Indiana line," where a temporary post had been previously set by him at the intersection of said line with the lake *on the north side of the lake.* (Transcript, 55–6.)

If we can take the date of his survey around the margin of the lake from the transcript of his field notes, we may suppose that he began it May 24, 1834, and signed the field notes June 17, 1834. (Transcript, 55, 56.)

In thus passing around the margin of the Illinois portion of the lake, he set no additional post, and referred to no witness trees, and established no monuments. The meander of the lake was not marked on the land nor on the official plat of the survey, and does not appear to have been retraced for fifty years after the original survey. Such retracing does not appear to have been made by the survey of 1874, which was only an extension of lines through the lake, and when such retracing was attempted in 1884 for delineation on Defendant's Map, Exhibit 4, page 130 of record, the meander could be run only by taking the field notes of the survey of 1834 as giving courses and distances.

In giving each course and distance in this measurement, he says: "Along the * * * margin of the lake," first, "the Southwest margin"; second, "the S. W. margin"; third, "the South-easterly margin": fourth, "the Southerly margin"; fifth, "the S. W. margin"; sixth, the North-westerly margin (evidently so intended); seventh, "the Northern margin." (*Ib.*) In one instance, in referring to the Western outlet of the lake running into the "Little Kalamick" and crossing the plaintiff's lands, he speaks of it as "the out-"let of lake, 40 links wide, a rapid current." (Transcript, 56.)

Referring briefly to the East fraction of the South East quarter of Section 30, we find the surveyor's field notes state that he "set a post, corner to Sections 29, 30, 31 "and 32, and ran West between Sections 30 and 31 2.84 "chains and intersected the South-easterly margin of "'Navigable Lake.'" (Transcript, 52.)

Here the direction of the act of Congress would have required him to extend that line West to the South West

corner of section 30 without any interruption had no lake or water-course intervened. But coming to the lake the line was cut short, and the running of it was not resumed until he crossed a point of the lake, on the West side of which was a fractional part of the West half of the quarter section, and at this point he placed a post on the South West bank of the lake; and having passed over the lake without running any line whatever, the distance across this point of the same was ascertained by triangulation.

The field notes also show as to the east and west lines of the South East fractional quarter of section 19, and the North East fractional quarter of section 30, they were extended to the lake.

Here we have what is called by the surveyor a lake, to which, however, he gave no special name, otherwise than by calling it "navigable lake." It is still essentially one lake, although common speech may call the western part of it "Hyde Lake," and the eastern part, which is in two States, sometimes "Wolf Lake." It is notable that the connection of the lake shown on the official plat with Lake Michigan was very distinctly recognized by Surveyor Clark when he made the survey in May, 1834. (Transcript, 55.) His field notes, as we have observed, recognized an outlet running through the North East quarter of section 30 to the Little Calumet river, called by him Little Kalamick river. Putting alongside of such facts another item, to wit: that the Indiana portion of the lake appears from the record to have had a still larger outlet through Wolf river to Lake Michigan, with which this body of water was in close proximity, and we find some explanation of the fact that Deputy Surveyor Clark in his survey of 1834 referred to the lake as navigable.

The annexed plat No. 3 shows the entire lake both in Illinois and Indiana and its connection with Lake Michigan.

What influence should be given in determining bounds, to the fact that the word "navigable" was used? How the word "navigable" was construed, or what it was supposed to mean in the sense in which it was applied, we are unable to state. Yet, it is very certain that when the line was run on the east side of the east fraction of the south-east quarter of section 30, to what was supposed to be a navigable lake, and when the south line of the same fraction was extended to the lake, it could not have been expected that a fraction of two and four-hundredths acres would be sold without reference to the lake which the surveyor had treated as its chief boundary. *All the more if the lake was navigable, it would be expected that such a tract would be upon it.*

The opinion of Mr. Justice Clifford in *St. Paul & Pacific Railroad Co.* v. *Schurmeier*, 7 Wall., 272, (19 Lawyer's ed., 74), applies with full force. It is there decided:

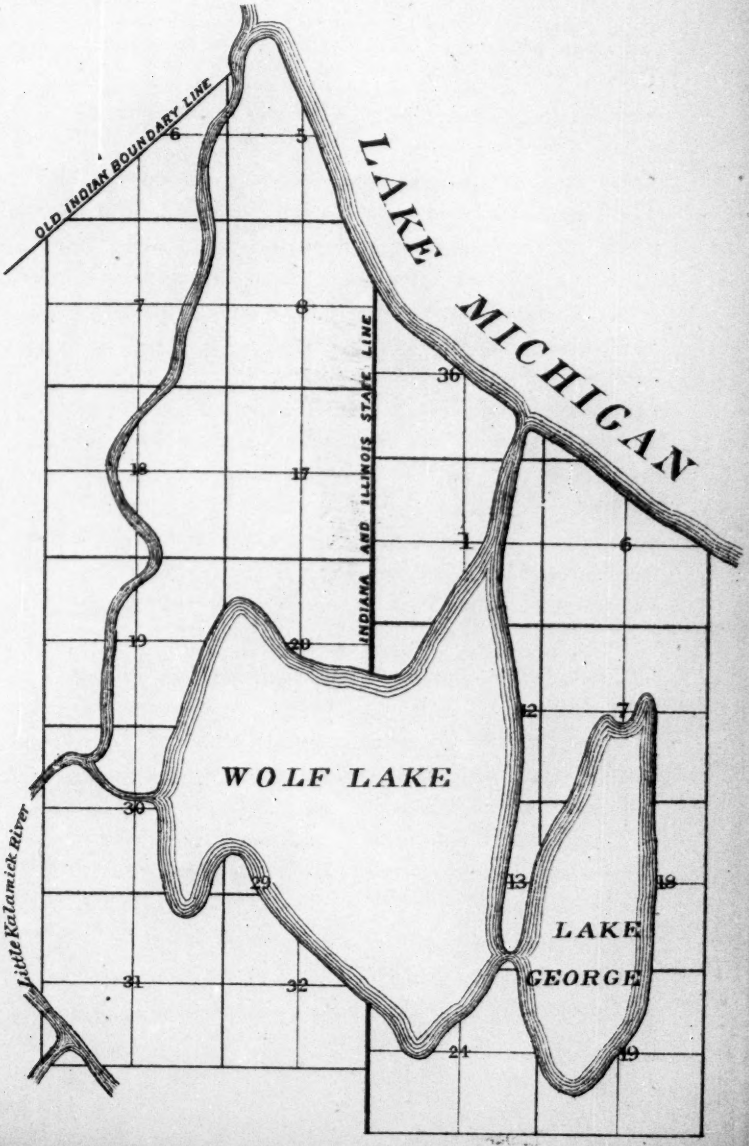
"Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of a tract, but for the purpose of defining the sinuosities of the banks of a stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser.

"In preparing the official plat from the field notes the meander line is represented as the border line of the stream, and shows to a demonstration that the water course, and not the meander line, as actually run on the land, is the boundary.

"Proprietors, bordering on streams not navigable, unless restricted by the terms of their grant, hold to the center of the stream; * * *. Grants of land bounded on rivers above tide-water, says Chancellor Kent, carry the exclusive right and title of the grantee to the center of the stream unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river, etc. * * *

No. 3.

Outline sketch of T. 37, N., R. 15, E., in Illinois, and of part of the township next East, in Indiana, and showing Wolf Lake and connection with Lake Michigan and Lake George.



"The views of that commentator are that it would require an express exception in the grant, or some clear and unequivocal declaration, or certain and immemorial usage, to limit the title of the riparian owner to the edge of the river, because, as the commentator insists, the stream, when used in the grant as a boundary, is used as an entirety to the center of it, and he, consequently, holds that the fee passes to that extent. * * *

"Substantially the same rules are adopted by Congress as applied to streams not navigable."

In the case from which the foregoing quotations are made, there was an attempt to restrict by a meandered line on or approaching towards the Mississippi river, a tract which the government had sold and conveyed according to the official plat of the survey of the same. The claimant of a parcel supposed to intervene between the meandered line and the river, as more definitely defined by a second survey by government authority, relied upon such second survey as embracing land which was between the river and the meander posts set in the first survey. But it was held that the official plat of the first survey, under which sale was made by the government, should govern, and that the second survey could not affect the title acquired from the government under the antecedent official survey and sale.

The case just cited appears to be ample authority for two propositions. 1, that the tracts of land under consideration should be held, under the official plat set out in the special findings, to have bordered on the lake. 2, that the second survey under the direction of the Commissioner of the General Land Office, could not affect the title of the plaintiff acquired under the antecedent official survey and sale.

The second proposition has apt support in *Webber* v. *Pere Marquette Boom Co.*, 62 Mich., 460.

JEFFRIES *v.* E. OMAHA LAND CO., 134 U. S., 178 (33

Lawyer's Ed., 1872), fully sustains the Schurmeier case as to the meander line, and repeats the doctrine:

"That a water line, which is a shifting line and may gradually and imperceptibly change, is just as fixed a boundary in the eye of the law as a permanent object."

In *Forsyth* v. *Smale*, 7 Biss., 201, which is in different particulars applicable here, his Honor, Judge DRUMMOND, considered *St. Paul & Pacific R. R. Co.* v. *Schurmeier*, *supra*, as sufficient authority for holding that a plat of Lake George, in Indiana, showing the plaintiff's land to be on the border of the lake, would make the lake a boundary. That lake is connected with Wolf Lake, now under consideration, and is shown on plat No. 3.

Courses and distances given as along the margin of the lake can not, nor can quantity, control in opposition to the plat, as showing a lake boundary.

As was said by Chief Justice MARSHALL in *McIver's Lessee* v. *Walker*, 9 Cranch, 173 (3 Lawyer's Ed., 694).

"Mistakes in courses and distances are more probable and more frequent than in marked trees, mountains, rivers or other natural objects capable of being clearly designated and accurately described."

In that case there was a call in the patent to cross Crow creek, to which call the Chief Justice said: "Courses and distances must necessarily yield."

The patent also made reference to a plat annexed, and it was held that "the grant should be run so as to con-"form as near as might be to the plat."

Our case is similar. The patent referred to the official plat of the survey, and as that plat bounded our lands on the lake, the grant should be held to conform to the plat in giving the lake as a boundary.

In *Brown* v. *Huger*, 21 How., 305 (16 Lawyer's Ed., 125), the court, by Mr. Justice DANIEL, said:

"A call for a natural object, as a river, a known stream, or a spring, or even a marked tree, shall control both course and distance."

The same opinion approved the reasoning and conclusions in *Mayhew* v. *Norton*, 17 Pick., 357, and *French* v. *Bankhead*, 11 Grattan, 136, both highly favorable to the view here enforced as to our right to the lake frontage.

What could the surveyor do except to state courses and distances as data for calculating the acreage of the different tracts? His doing this was by no means equivalent to making the meander a boundary line when not noted as such on the official plat.

This was distinctly held in *Middleton* v. *Pritchard*, 3 Scam., 510, and in sundry other cases in Illinois. One of the latest of these cases is *Fuller* v. *Dauphin*, 124 Ill., 542. A head note to that case brings out sufficiently, perhaps, the point we now make, when it states

"A meandered line which is run along a water-course merely for the purpose of ascertaining the quantity of land in the fraction lying upon a river or slough, is not a boundary line when it appears from the minutes of the survey, and does not appear upon the plats filed in the land office." (*Ib.*, 542.)

In the case last cited Mr. Chief Justice Sheldon noticed earlier cases in the same court to the same effect, and suggested a fact which appears here as it did there, to wit: that the plats in the land office and Surveyor General's office had no lines marking the courses and distances along the stream. The decision was in full view of the fact that a meander line is run along water-courses for two purposes, one being to show the course of the stream and another to calculate the area or number of

acres inside the meander. Here, as in that case, the meandering appeared only by the minutes of the survey, and the official plat or plats did not show the courses and distances around the lake, but represented the lake itself as a boundary.

Would the rule be altered if by recession of waters the contents of the dry land would be enlarged beyond the estimated area? Certainly not. All the cases are with us on this point. Whether there was more land than was computed when the official plat was made, or is now more from change of the waters, is immaterial.

In *Houck* v. *Yates*, 82 Ill., 179, the plats in the United States Land Office showed the Mississippi river as a boundary. It was argued that the field notes showed that "a line was run between the river marked on the plat "and the lands actually purchased by appellee, and that "this line formed the southern boundary," etc. (*Ib.*, 182.) The court rejected this argument, saying:

> "That a meandered line which does not appear upon the plats in the United States Land Office, and which was no doubt run for the sole purpose of ascertaining the quantity of land in the fraction, should have the same effect as a visible monument, is a proposition which we do not feel inclined to sanction."

Later on we shall refer to other cases, showing that the east fraction of the south-east quarter of scction 30 was, under the survey of 1834–5, a shore tract.

Was the survey of the lake-bed in 1874 made by authority of law? If the lake bed was not reserved by the United States, or if we had riparian rights, such survey was inadmissible. It will be incumbent upon the defendant to show that it had a legal sanction.

Bearing in mind that the United States did not make any *reservation of the lake in selling bordering lands to*

Mr. Holbrook in 1838, it follows that we had the rights of a shore proprietor. This, as we suppose, disposes of all right to make another survey. Our lands being represented on the official plat of the survey of the public lands as being bounded by the lake, the trial court, under the special findings, should have given us the benefit of the official plat, and should have awarded to us all the rights incident to riparian ownership.

Whether Commissioner Burdett had authority under the statutes to order a survey of lake beds was a question which was propounded to his successor in office, Commissioner J. A. Williamson, when Mr. Secretary Schurz, of the Department of the Interior, was about to answer a resolution of the H. R. of the U. S., calling for information as to a survey of the beds in Indiana of lakes Wolf and George. Mr. Williamson answered: "In regard to the law under which said survey was made I have to say it was done without the authority of a specific law upon the subject." (Printed Transcript, 77.)

His reference to sections 2,401 and 2,219 of Revised Statutes of United States did not support the claim of authority. The former section applies only to new territory where surveys are to be made within the range of the regular progress of the public surveys, and not to cases where the public survey have been ended for ages. The latter section merely made Commissioner Burdett *ex officio* Surveyor General under certain circumstances, but not in respect to the survey of lake beds when the government has parted with its proprietary interest in all adjoining lands.

The sale of such adjoining lands left to the United States no remaining proprietary interest in the lake bed.

II.

THE MATTERS STATED IN THE SPECIAL FINDINGS DID NOT JUSTIFY NOR REQUIRE THE DENIAL OF LAKE FRONTAGE TO THE SOUTHERNMOST FRACTION.

We come now to a more particular consideration of the matter set forth *in item 4 of the special findings* (Transcript, 57), *so far as that matter may be supposed to have affected the judgment of the Circuit court in this case in regard to the east fraction of the south-east quarter of section 30.*

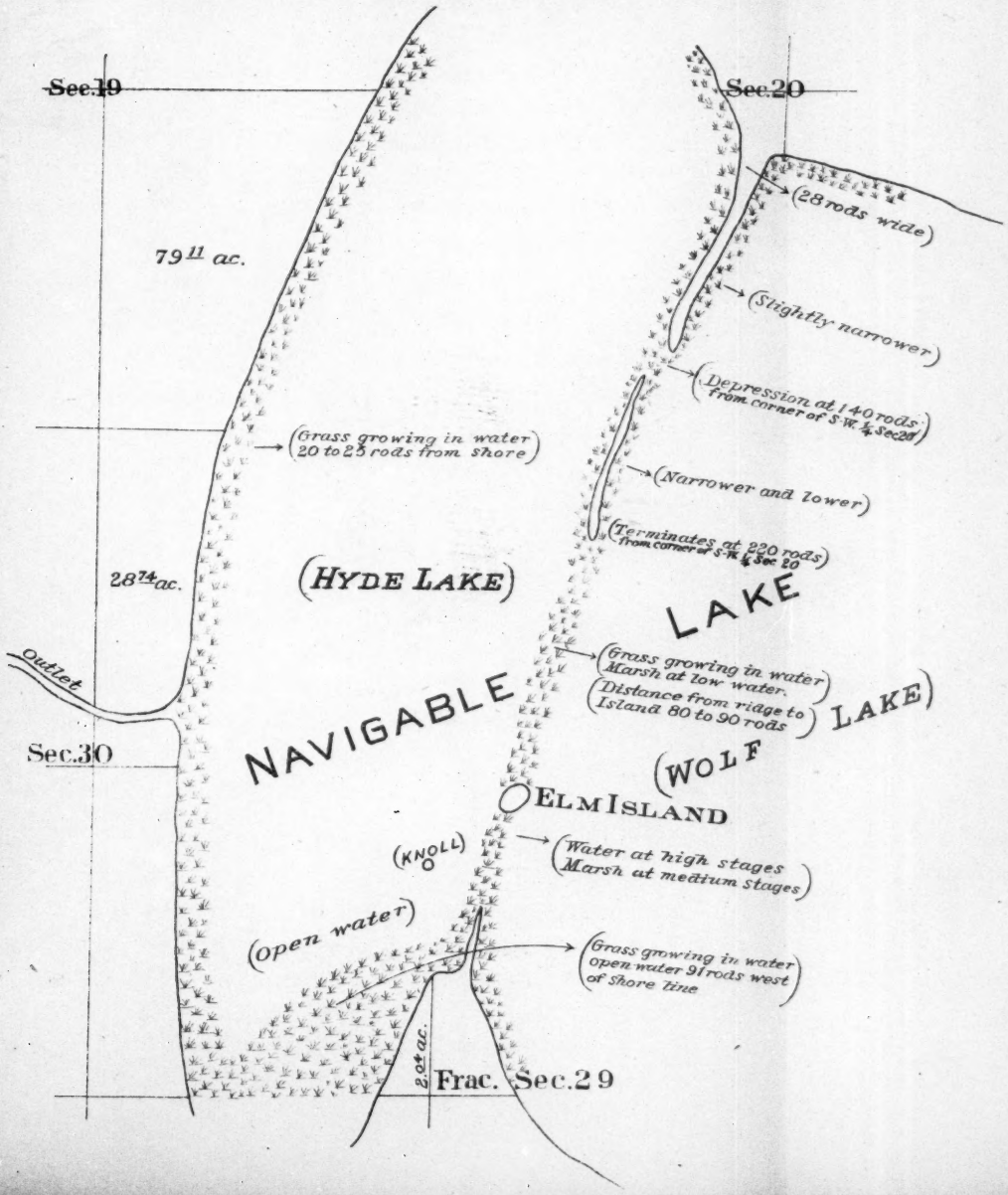
To indicate outlines of the ridge, which is specially treated or described in said article of the special findings, we here insert diagram or plat No. 4.

As we have said, the findings state a conclusion, *not of fact but of law*, as to this fraction, "that the plaintiff was "bound by the meander line run by the U. S. surveyor." (*Ib.*, 59.) What meander line, or by what United States surveyor was it run? The learned Circuit Judge received in evidence on the part of the defendant a certain map, "Exhibit 4," page 130; and it would seem that as to this branch of the case the special findings followed the said map, giving the east fraction of the south east quarter of section 30 the shape "of a right angle triangle, with its "base resting on the south section line, with the meander "line as a western boundary thereof." (Transcript, 58, and defendant's "Exhibit 4," page 130.)

Said map is unfair in its representation of the lake, differing in this regard from the official plat of the surveys, both of 1834 and 1874. It attempts to put this fraction at a distance from the lake greater even than the figures given by it as to elevations would warrant.

No. 4.

Outline to indicate result of the special findings as to the ridge extending into the lake from near the center of Section 20, and showing the present nomenclature (Hyde Lake and Wolf Lake) of the lake represented on the official plat as Navigable Lake.



According to those figures much of the supposed land would be submerged. And besides, how does the defendant dispose of statements in the special findings, as to the survey of 1834–5, such, for example, as the statement that the "body of water shown upon the plat * * * "as 'navigable lake' was in fact meandered by the sur- "veyor, the meander line being run substantially upon the "margin of said lake as shown by said plat, save as fol- "lows, viz: that the said line was carried across a certain "ridge of land extending from the center of fractional sec- "tion 20," etc.? (Transcript, 57.) Is it an explanation of the supposed line being taken as a line of boundary of this small fraction out of the three fractions owned by us, that land and water have contended against each other, as to the parentage or name of an area next to the meander? The contention is described as follows in the special findings: As to the southerly portion of the lake west of this fraction, there is outside of the meander line "a growth of reeds and coarse or swamp grass growing in the water," and generally "the physical "condition west of the meander of said east fraction is "the same for a distance of ninety-one or more rods "westerly as it is generally at and along the meander "line" around the lake, the same character of growth appearing in the water at ordinary and high stages for said distance west of said line, "the greater part of " * * * said east fraction (2.04 acres) being wet "and unfit for cultivation, and only slightly higher than "that to the west," while "the point at which to the south "the open water of the lake ceases, and marsh grass "begins is several rods north of the south line of section "30." (Transcript, 58.) We may imagine with the findings an engagement between parties brave and fair,

from the survey of 1834 to that of 1884, the land making advances towards the water, and the water meekly holding its face towards the sun in the daytime; yet at the end of the wooing, so far as reported, the land is found to be a sorry suitor, clothed only with reeds and coarse swamp grass.

The substance of this finding would seem to be that the Circuit court took the defendant's map (Exhibit B aforesaid), as evidence of the meander line, and adopted, not as absolute facts, but as persuasive enticements, the suggestions in said map, tending to show that on the 4th of November, 1884, it was not so much a lake as it was marsh land west and northward from the triangle represented upon said "Exhibit 4" as the east fraction of the south-east quarter of section 30.

The common law, as we shall presently see, presented a better light to guide the court. It gave riparian rights, attaching to the soil in the lake no matter whether it was covered with much or but little water, it being part of the lake as delineated on the plat of the survey of 1834–5; and the minute examination into which the court entered, as to the character still left to this part of the lake, was not proper, nor was it authorized under common law principles.

It was the view of the Circuit court that as the meander line as shown from the survey made in November, 1884, was at a distance from what may be called the open water of the lake, the plaintiff was not to be allowed to go to the lake for a boundary as to said east fraction. But such conclusion should not have been adopted. Put leading facts together. The official plat of the survey of 1834 gave that east fraction a lake boundary. The special findings thus show, and they set out the plat. Besides

this, they state that the surveyor from whose notes the plat was made, ran the meander line of the lake substantially upon the margin of the lake, with a single exception, which does not pertain to said east fraction. The exception named in the special findings is as to a ridge running into the lake from near the center of section 20. (Transcript 57.) Moreover the special findings set out the field notes which show that two lines of this tract as surveyed extended to the lake. But suppose that a ridge of land extended from near the center of section 20 southward into the lake, can it yet, with any show of reason, be argued that the official plat of the survey of 1834, by which John Holbrook purchased the said small fraction, is to be disregarded as to the lake boundary? Or could this be so merely because the surveyor in surveying around the lake omitted what may now at times seem to be a rim of doubtful coast, next to this fraction, but which he at the time treated as a part of the lake? The question would still be was the meander line intended as a boundary, instead of the lake? That, of course, we dispute *in toto*. If the United States had desired to detach from this small fractional subdivision as platted in 1834 and 1835 the excrescences and sinuosities of the land next to the water, and to make a precious saving for future nosegays of the coarse grass and reeds which might in time sprout up between the open water of the future and the fraction as marked on the official plat, then a new survey should have been ordered before making the sale to Mr. Holbrook.

It cannot be urged that the special findings state that the said ridge extends to the south side of the lake, to that part of the lake with which the official plat connected this tract. Nor do the special findings show, as to this

part of the lake, that land which ought to have been surveyed or estimated was omitted by Deputy Surveyor Clark in taking the courses and distances along the margin of the lake, so far as this tract is concerned.

At the same time we do not concede that if there had been such omission, either in the survey or in the estimation of area, our rights would be altered. We maintain that the official plat would still govern, and that the running by Deputy Surveyor Clark of the east and south lines of this fraction to the lake, as the field notes state, would carry this tract to the lake, so that it must legally be said it was and is on the lake, properly so considered, or yet extends to the lake. It is not the Surveyor General's statement of quantity which controls as to the measure of the fraction. The cases are very numerous in which the area of a legal subdivision has been found to be much more considerable than as stated on the official plat, and yet all has been held to pass by the legal description. The purchaser is presumed to have made his purchase of the legal subdivision more or less.

The letter or decision of *Mr. Secretary Vilas in the matter of James Hemphill, supra*, shows our right to hold to the lake, so fully and clearly that we might with it rest our argument as to this branch of the case.

Houck v. *Yates*, 82 Ill., 179 (above cited), shows that a large fraction next to the Mississippi river passed as a part of a subdivision, the area of which was not correctly computed in the Surveyor General's office, who used the field notes and the meander of the Mississippi river in making the computation.

The case of *St. Paul & Pacific Railroad Company* v. *Schurmeier*, *supra*, is a case of like order illustrating this view.

A further illustration will be found in *Lindsey* v. *Hawes*, 2 Black (67 U. S.), 554, (17 Lawyer's ed., 265.) We quote from Mr. Justice Miller's opinion:

> "The meanders of the Mississippi river, the quarter section posts and the area of the fractional quarters, were all given by the survey. It appeared by it that the south line of the quarter section impinged upon the river at a point near the center of the line and thus divided that part of the quarter which was south of the river into two separate fractions. The computation of this survey gave the contents of the east fraction as 1.87 acres and the west fraction at 5.17 acres."

In a controversy between the parties involving the latter fraction, Hawes, who contested a pre-emption claim of Lindsey, urged that there was a mistake in the survey made by Bennett, the deputy surveyor who surveyed the land for the United States in 1833, and that by another survey, made by direction of the Commissioner of the General Land Office in 1844, it was ascertained that Lindsey, who had purchased the land as a pre-emptor, was not on the land for which his pre-emption certificate called, but was shown by the new survey to have been on another tract. In such new survey the west fraction which was so claimed by Lindsey under his pre-emption and certificate of entry, was found to contain 13.23 acres instead of 5.17 acres, while it was also found that the south line of the quarter section was located so far north as to leave the house in which Lindsey resided when he made his pre-emption, entirely south of the quarter. This court held that the government was bound by the original survey of Bennett, and that Lindsey took all the area of the fraction, notwithstanding the fact that he had paid for only 5.17 acres.

Do we hear it said that the tendency of the statement in the special findings is towards showing that there is, in the case of this small fraction of ours, something like

land intervening between the lake and the meander line around the lake, as such line may be ascertained by taking the courses and distances stated in the field notes of John A. Clark when he went around the "margin of the "lake"? If this should be so, ought it to make any difference in view of the legal principles governing the case, such, for example, as are suggested in the authorities last named? But do the special findings show that it is land, and not a part of the lake, which is next to the 2.04 acres of the area of this East fraction of the South East quarter of section 30? If it had been intended by the special findings to state that it is absolutely land, and not lake, why was not the statement expressed in so many words? Or if it had been intended to say that the surveyor made a mistake in running the supposed meander line of the lake, so far as this fraction is concerned, why did not the special findings state that there was such mistake? We must go back to the official plat of the survey of 1834. The special findings do not impeach its value nor its weight. They suggest that for a distance of ninety-one or more rods westerly from the meander line there is a certain character of "growth appearing in the water at ordinary "and high stages," that is, "a growth of reeds and "coarse or swamp grass," and that the point at which the open water of the lake nearest to said East fraction ceases and marsh grass begins, is several rods north of the south line of section 30 (Transcript, 58); yet this does not well show that John A. Clark was in error in his survey of 1834 in treating that which is now shoal or low lying strand as a part of the lake.

Is there any reason to suppose that such reeds and grass were growing in 1834? Are the boundaries of the tract to be determined by the change of circumstances, that

becoming beach-like in the course of fifty years which was at the beginning of that time a part of the open lake?

We cannot infer that the learned Circuit Judge found any mistake in the official plat, since he did not so declare. Nor is it probable that he was of the opinion that such mistake, if any, was subject to be corrected through the action of Commissioner Burdett in ordering and approving the survey by Alexander Wolcott in 1874 of the entire lake bed.

It is clear as the sunlight that Commissioner Burdett did not order a survey for the purpose of correcting the old one, and that there was no pretense of any mistake in the old survey. Besides, it is clear that the only object of the Wolcott survey was to appropriate the lake bed, it being claimed by Commissioner Burdett to be the property of the United States. The true question, therefore, is, whether the defendant has appropriated it rightfully as against the plaintiff, and such appropriation is absolutely without legal right unless it be determined that the proximity of the lake to the land surveyed was, in this instance, an absolutely immaterial fact, and that the meander of the lake kept it scot free from any claim to either small or large *sinuosities* extending beyond the line of the meander. That is the point to be determined here, and it is an afterthought or evasion to say that any land which happens to be between the line of meander and the open lake was subject to be appropriated by the United States or any one claiming under Alexander Wolcott's survey of the lake bed.

Why did his Honor speak of a "marsh growth of "reeds or coarse or swamp grass growing in the water," etc., next to this fraction, and of the open lake being somewhat north, etc.? Will it be said that it was a matter of

doubt at the time of the trial whether there was open lake next to this tract? What difference would that make? Was it not a part of the lake in 1834: a part, that is to say, of such a lake, "subject to fluctuations "alike from the operation of the change of the level of "Lake Michigan from storms, winds," etc.? (Transcript, 58.) Even as elevations are marked on defendant's "Exhibit 4" (Rec., 132), they are not such next to this fraction as would free the lands next to the meander from being submerged at periods of high water in the lake, or at any time when the water in the lake is more than two and two-tenths feet above datum. Practically the part of the bed supposed to intervene between the meander and the open lake, as represented in said exhibit, is less than three feet above datum, and the special findings show that "the extreme rise and fall of Lake Michigan is from five "feet above datum to one foot below datum." (Transcript, 59.) The court thus practically showed that the water at two and two-tenths feet in this lake above datum will submerge this intervening coast, which at low stages of the water is marsh, having a growth of reeds and coarse or swamp grass. Surely, some better reason must be found for making a meander line a line of boundary than a statement that there is "a growth of "reeds and coarse or swamp grass" in the water.

The special findings intimate that a supposed departure by Deputy Surveyor Clark in his survey along or around the margin of the lake in 1834, from a close contact with such margin, in pointing his compass and taking distances, is entitled to consideration. The exception from such contact, if we may repeat such exception, is supposed to have been in this, that the meander was "across a certain "ridge extending from the center of fractional section 20

" in a southerly direction," etc. (Transcript, 57.) The consequence of the surveyor having crossed the ridge instead of having traversed it, is more directly involved in *Mitchell* v. *Smale*, No. 167 on the docket of this court for this term; but we notice some features of this matter because of the prominence assigned to the same by the special findings, and also because of the error in general in the conclusions as to boundaries of lake shore proprietors in the judgment of the trial court upon the facts found.

In *Forsyth* v. *Smale*, 7 Biss., 201, (cited above), where a gore of land extended into Lake George in Indiana, it was held by Judge Drummond that it would apparently pass to the shore proprietor whose lands were, according to the official plat, bounded by the lake. This was so held, although the lines supposed from the official plat to have been extended to the lake, would not, in fact, reach the same, and notwithstanding the fact that the meander of the lake ran across a gore or ridge of land, as in the present case as to the ridge described in the special findings.

In *Shufeldt* v. *Spaulding*, 37 Wisc., 665, a grant by the United States of certain fractional lots situated on a lake was construed, and was held to include an unsurveyed gore or strip extending into the waters of the lake at a point in front of the fractional lots outside of the area of a quarter section if the lines were extended into the lake, the shore owner not being limited by a mere extension to regular limits of the lines of a quarter section.

The Commissioner of the General Land Office had in that case directed a survey of the gore or strip; but it was not found that he could claim it for the government.

Here we should make a general observation again as to the statutes concerning surveys. The surveyor was ordinarily only required to mark section corners, running section lines only, and not the lines of smaller subdivisions. He was not required to run lines through the center of the sections, north and south and east and west. These would be drawn in the making up of the plat in the Surveyor General's office. *Brown* v. *Clements*, 3 How., 650 (11 Lawyer's Ed., 767), further explains the whole matter as to what such officer was to do. While that case was in some respects disapproved in *Gazzam* v. *Lessee of Phillips*, 20 How., 372 (15 Lawyer's Ed., 958), the applicability of its suggestions in this regard is not impaired. It is not, therefore, to be supposed that Deputy Surveyor Clark ran any of the lines of fractional south-west quarter of section 20. He made his survey without any reference to what area would be assigned to that fraction. The contents of that fraction would be estimated in the Surveyor General's office. (Rev. Stat. U. S., § 2,395, clause 8, and § 2,396.)

It was enough for deputy-surveyor Clark to return his field book, and then the Surveyor General was to cause therefrom a description of the whole land surveyed to be made out and transmitted to the officers who might superintend the sales. (*Ib.*, 2395, cl. 8.) But according to *Brown* v. *Clements*, *supra*, it was the duty of the Surveyor General to lay out each fractional section in such a manner as to make entire quarter sections if the fraction would admit of it. His not doing so was explained by the lake boundary.

The surveyor in running his line around the lake would quite probably disregard slight sinuosities; for these he was not attempting to display further than as to general

bearings, so that the area of the land might be determined with reasonable accuracy.

Our general proposition is that the official plat governs, and that it is not to be disregarded because of mistakes in estimating quantities, nor because the meander line was not coincident with the shore, if such was the fact.

This appears from *Everson* v. *City of Waseca*, Minn., ; 46 N. W. Rep., 405. That case involved a question of title to land. The question was whether the purchaser from the government acquired title to the land beyond the meander line and to the shore of Loon Lake, or only to the meander line. In fact the meander line was run some distance from the shore of the lake, leaving several acres of dry land between it and the shore. The court said as to this land:

> "We deem it to have been well settled by the decisions of this court, of the Supreme court of the United States and of other states, that under circumstances like those here presented, the title of the purchaser from the general government extends to the meandered lake or stream, although the meander line of the survey be found to be not coincident with the shore." (Citing numerous authorities) * * * "The title of the purchaser from the government was not limited by the erroneously surveyed meander line."

Our case, as to the east fraction of the south east quarter of section 30, is a stronger one for the retention with that fraction of the land, if any, between the meander and the open lake than was the Minnesota case just cited; as the surveyor so clearly intended to give a lake frontage to this fraction.

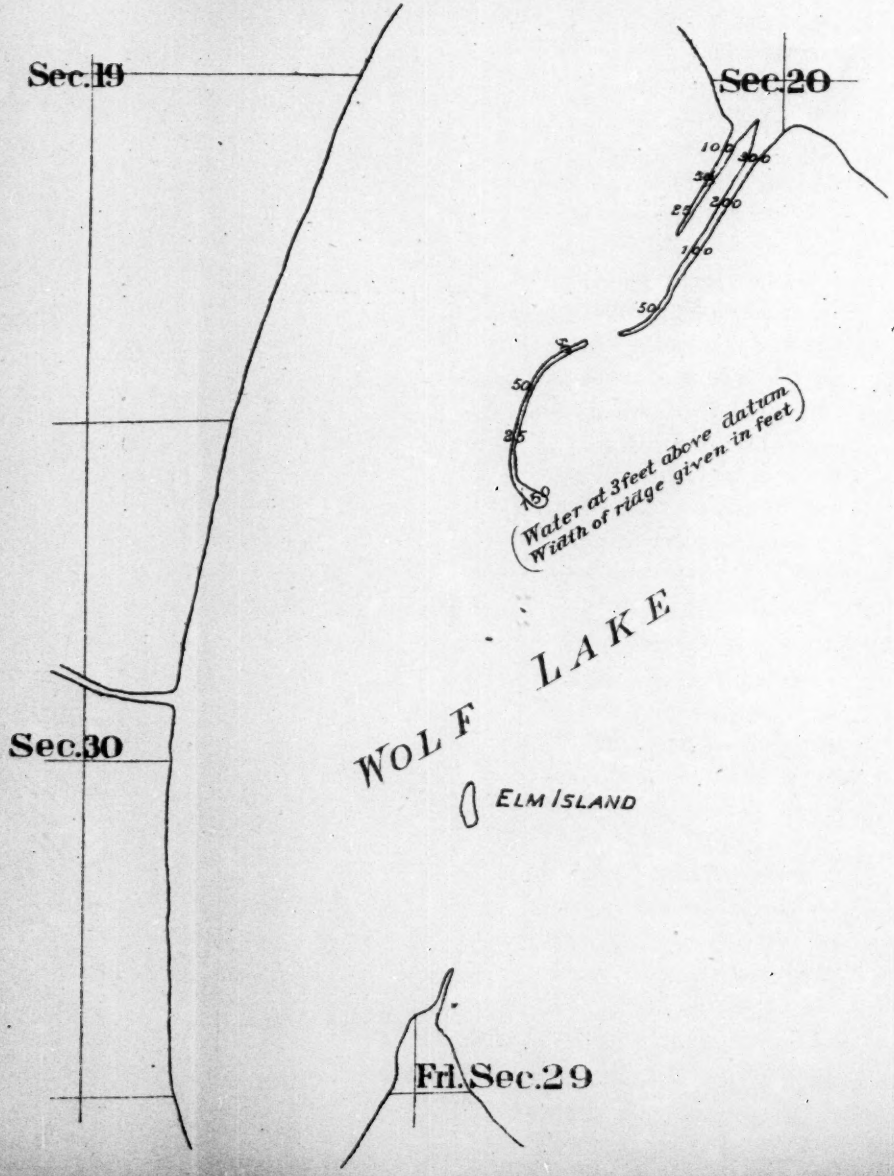
But let us look for a moment more at defendants' Exhibit 4 (Rec., 130) to see what is thereby supposed to have been done by the surveyor in 1834 in running a meander line along the northerly margin of the lake. He did

not disregard the fact that there was a projection of land southwardly from the center of section 20 (which center he had not been required to mark.) But from a post on the section line between sections 19 and 20, on the margin of the lake (Transcript, 54), the meander line which this exhibit attempts to mark runs a little north of east, and then runs off towards the south-east, and striking the lake as shown in the exhibit in the north-west quarter of section 20, it runs through a part of the lake into this supposed ridge at a point which this exhibit reports as being 2.4 feet above datum (this being below high-water mark in the lake); and then turning upon a course which is a little south of east runs for some distance before striking any point which would be above the level of the lake at a high stage of water. Tracing this line from this point east, it will be seen that there is but a narrow strip which is even now at as great an elevation as 6 to 6.6 feet above datum, and this narrow strip alone would have been all that was probably susceptible of any survey. There is but a thread of land in the ridge above the lake level.

Deputy Surveyor Clark was running through a marsh in which the water was from six inches to three and a half feet deep, in meandering along the northerly margin of this lake. (Transcript, 56; Rec., 116.) Suppose, then, that he did not take into the fullest consideration to which its merits entitled it, this ridge; yet, even as represented it by defendant's "Exhibit 4" (Rec., 130), it was but a narrow strip, but little of which would be above a medium stage of water in the lake. The red figures on the map, defendant's "Exhibit 4," are said to show the elevations above datum, and where they are lower than three feet, as is the case except as to a comparatively small part or thread in the center of the strip, it will be covered with water at some stages of water in the lake.

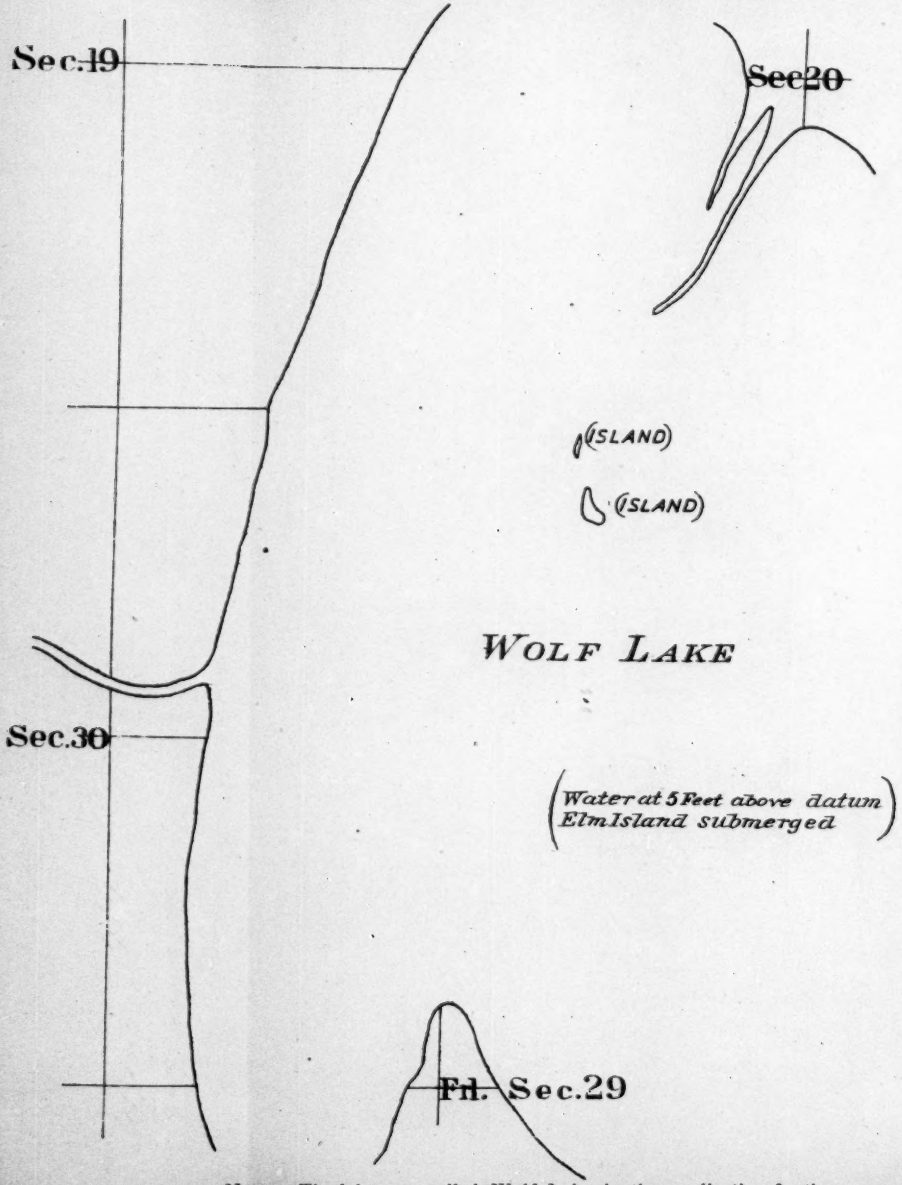
No. 5.

Outline sketch of ridge jutting into the lake from near the center of Section 20; water at three feet above datum, according to Defendant's Exhibit 4. (Lake called Wolf Lake in application for survey of 1874; part west of ridge, now called Hyde Lake.)



No. 6.

Outline sketch illustrating the ridge extending into the lake from near the center of Section 20; water at five feet above datum, according to Defendant's Exhibit 4.



NOTE. The lake was called Wolf Lake in the application for the survey of 1874; part west of ridge, is now called Hyde Lake.

Diagrams or maps No.'s 5 and 6 ~~following~~ preceding show how the ridge would be submerged when the lake is at three and five feet respectively above datum.

While said Defendant's "Exhibit 4" is not accredited in the special findings, save as to a part of the description thereon of the ridge, it may well be doubted whether it shows that Deputy Surveyor Clark ought to have deviated in the meander of the lake further than he did deviate from an easterly course towards the south when he approached this ridge from the west. He could not have supposed that a further deviation would take in land enough to justify the expense of a survey.

The Government was looking to the settlement of the public lands, and was arranging for their sale, and no one would have been expected to settle upon the narrow thread of land which the deputy surveyor is supposed to have run over when, as his field notes state, he passed along the northerly margin of the lake. Can any instructions to surveyors in the printed manual, or otherwise, be found that would have required the surveyor to run from the northern point to the southern point, wherever that was, of this ridge? *Non constat*, the ridge was but a thread at the most, or submerged, at the time of the survey of 1834. The pretense that the non-survey or non-estimate in the surveyor-general's office of this narrow strip of land can control the patent, is the veriest afterthought. It is brought up for the purpose of sustaining a survey which was illegal. The thought that such a small omission by Deputy Surveyor Clark, or in the action in the Surveyor General's office in estimating quantities, should have any control, or should enable the Commissioner of the General Land Office to claim the lake,

is of a farcical order. The snrvey of 1874 was not of omitted lands, but it was a survey of what was stylcd Navigable Lake in the survey of 1834.

III.

The Evidence Received for the Defendant was Improper, and Should Not Have Affected the Plaintiff's Rights.

If the meander of the lake in 1834 did not define a fixed boundary line, the same in fixedness as the side lines north and south and east and west in marking subdivisions, or if the United States did not reserve the lake in selling the lands according to the official plat of the survey, the claim set up by the defendant had no support, and this evidence based upon it should not have been received.

It has been stated at some length in considering "Exhibit 4" (Rec., 130), and the supposed official plat of the survey of 1874 (Rec., 132), and also in referring to the suggestions in the special findings as to the surveyor having run his meander of the lake in 1834 and 1835 across a certain ridge. The decisions in the General Land Office and by the Secretary of the Interior, in support of the survey of the lake which was approved by Commissioner Burdett, December 31, 1874, signify only that Mrs. Hardin might have appealed from the order approving such survey, and that not having so appealed (Transcript, 99), she must have "her remedy in court." (Transcript, 101.) The United States' officials could not arbitrarily dispose of Mrs. Hardin's rights as a riparian proprietor.

Acting Secretary Bell of the Department of the In-

terior, in thus stating the matter, recognized the fact that if the survey of 1874 was illegal, Mrs. Hardin should have a remedy. He said, "if the survey was illegal and "unauthorized, as alleged, the courts in a proper case "can so declare." (*Ib.*)

These decisions by the Commissioner of the General Land Office and Department of the Interior should have no weight in this proceeding, nor should they have been received in evidence. *The point made in the fourth assignment of errors is well taken.*

Lindsey v. *Hawes*, 2 Black, 535, *supra*, and cases there cited, show that the regulations and decisions in the General Land Office do not oust the jurisdiction of the courts of justice.

It is true that some proceedings became necessary on account of the functions assumed by Commissioner Burdett in ordering a survey of the lake. This encouraged individuals to invade the lake, or encamp upon it. But the official action could not reach the dignity of a judicial determination. It only amounted to an assertion of a claim in behalf of the United States to the lands supposed to have been discovered by the survey of 1874.

It was, however, largely a contest between the officials and third parties, and Mrs. Hardin was not formally a party to it.

Commissioner Burdett's theory as to the right of the United States to dispose of the entire lake bed brought forth a large spawn of claimants. A veritable hydra sprang up, like the fabled hydra in Lake Lerna, and it soon became necessary for one of the Commissioner's successors, Mr. Williamson, to prove himself a Hercules in decapitation. He first armed himself with the

order of Mr. Burdett, of December 31, 1874, approving of the survey by Alexander Wolcott, and bade defiance in the name of the United States.

What slaughter this fatal club accomplished, is told in a letter from Commissioner Williamson of February 12, 1878. (Transcript, 79–92.)

The Illinois Central Railroad Company claimed a part of the new lands, as having become vested under the act of September 20, 1850, granting lands to the State of Illinois, to aid in the construction of a railroad from Chicago to Mobile. The State of Illinois and the county of Cook also set up claims under the Swamp Land Act of September 28, 1850. Those parties, as well as some who presented themselves with Porterfield scrip and Sioux half-breed scrip, were routed by the officer, who tendered the lands to certain squatter claimants, or pre-emptors and homesteaders. (*Ib.*, 90, 91.) The result was, that Commissioner Williamson allowed the entire lake bed to be parceled out between such pre-emptors and homesteaders, through whom the defendant claims.

What appears to have been the reasoning for such action in the Land Office?

It was that these lands constituted the bed of what was known as Wolf lake, shown by the survey of the township in 1835 as a "navigable lake"; that application for the survey of the lands within the lake limits was made under a circular issued from his office July 13, 1874; that a survey was thereupon made, and was approved December 13, 1874, and that on the 9th of January, 1875, a copy of the plat of such survey was sent to the district officers at Springfield with instructions to notify all claimants for the lands of a day set for hearing testimony regarding such claims, etc. (Transcript, 79.)

In respect to the claim of the Illinois Central Railroad Company, he held that this land was not in existence at the date of the grant to the State of Illinois under the act of September 20, 1850; that meanders of what was termed a "navigable lake" covering the lands in controversy, were run in 1834 and 1835; that his office had been so far governed by the plat constructed from that survey, in disposing of the lands in the township; that the first evidence presented to his office of the existence of the lands within the limit of such a meandered lake was found in the affidavits of Franklin A. Cleaveland George A. Rowe, Chester B. Rushmore and Alice A. Condit, presented August 19, 1874; and that although it was possible that at the date the railroad land grant set up by the Illinois Central Railroad Company became effective, there was between the actual borders of the lake and its borders as laid down in the survey of 1835, a small strip of timber, yet the testimony as to the width of this strip in 1850 was so conflicting that it was not practicable, in the Commissioner's view, to determine, even approximately, its area in section 20 in 1850.

By like reasoning he disposed of the claims of the State of Illinois and county of Cook, and suggested in regard thereto a failure to show that the plat of 1835 did not correctly represent the boundaries of the land in 1850, and also a failure to establish the swampy character of the land in 1850. He, however, used a decision by the Department of the Interior as disposing of the claims under the Swamp Land act. That decision was stated as follows: "As long ago as November 20, 1855, the "Secretary of the Interior decided that the State of Illi- "nois was not entitled to swamp lands under the grant of "September 28, 1850, in either odd or even numbered

"sections, within the six miles limit of the railroad land "grant." (Transcript, 82.)

These rulings of the Commissioner presented the idea that said acts of September 20 and 28, 1850, operated as grants *in præsenti*, and did not operate as to lands, such as were those in this lake bed, which were subsequently to those dates brought into existence as lands by the recession of the water covering the same. (Transcript, 82.)

Later, to wit: on the 4th of May, 1880, Mr. Secretary Schurz, of the Department of the Interior, affirmed the ruling of Mr. Commissioner Williamson, and held that the order of December 31, 1874, approving the survey, was not then subject to be disturbed, because it was an accomplished fact, "ordered, begun and executed under "a former administration." (Transcript, 92–3.)

The logic of these official decisions would defeat the survey of lands within the limits of the lake.

IV.

THE PLAINTIFF WAS, BY THE SPECIAL FINDINGS, ENTITLED TO A FULL RECOVERY, AND SHOULD NOT HAVE BEEN LIMITED TO THE LOW-WATER LINE IN RESPECT TO ANY OF THE TRACTS.

The facts found would give the shore proprietors rights in exclusion of the United States, since the United States did not reserve the lake when it made sales according to the official plat of the survey of 1834 and 1835; and if, as Commissioner Williamson held, the waters of the lake receded or evaporated after the United States parted with its title to the lands on the shore, the right of accretion or

reliction gave to the shore owners proprietorship over the new lands. The fluctuation of the waters, as stated in the special findings, would raise the question whether there have been permanent relictions. But if there were such, they belonged to the riparian proprietor: *Warren* v. *Chambers*, 25 Ark., 820; S. C., 4 Am. Rep., 23. The case just cited is fully for us, both as to our having the lake for a boundary, and as showing title in us as to the land outside of the meander line; and we shall again refer to it as a case pertaining to riparian rights of lake shore proprietors. As was stated by Chancellor KENT, speaking of the riparian right upon rivers:

> "It would require an express exception in the grant, or some clear and unequivocal declaration, or certain and immemorial usage, to limit the title of the owner * * * to the edge of the river. Where a stream is used in the grant as a boundary or monument, it is used as an entirety to the center of it, and to that extent the fee passes. * * * If soil be formed by islands or relicted out of the sea or a river, by slow and imperceptible accretion, it belongs, in the case of the sea or navigable rivers, to the sovereign; and in the case of rivers not navigable, in the common law sense of the term, or above where the sea ebbs and flows, it belongs to the owners of the adjoining land. * * * Each proprietor is entitled to a larger or smaller proportion of the alluvial formation and shore line, according to the extent of his original line and the shore of the river." (3 Kent's Com., 428.)

This was the law of the United States, and of the State of Illinois.

As was held by this court in *Jones* v. *Johnston*, 18 How., 150 (15 Lawyers' Ed., 320): "The calls in the "deed having reference to the official plat, furnished the "necessary *data* for the location." * * * "The "water line, though it may gradually and imperceptibly "change, is just as fixed a boundary in the eye of the law "as 'a permanent object,' such as a street or a wall." Here, as in that case, the lake to which the surveyor

extended the side lines, and which was represented on the official plat as a boundary, should be held to be the true boundary. The plaintiff is carried by the patent to it because, as Mr. Justice NELSON said in that case, "the calls given in the deed required "that the side lines should "be thus extended." We may add, as the same learned Justice said, "Any alluvial accretions since the date of "the deed would belong to the plaintiff as owner of the "adjoining land."

Of course, we substitute here patent for deed as used in that case, and as to calls refer to the field notes. The principle holds that the plaintiff would be carried as far as the new made land extended, or each riparian proprietor would be entited to his proper share.

In *County of St. Clair* v. *Lovingston*, 23 Wallace, 46, (23 Lawyers' ed., 59), affirming a judgment of the Supreme court of Illinois, it was held, as to a tract of alluvial land on the Mississippi river, that the right to it was:

"An inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. * * * The owner takes the chances of injury and of benefit, arising from the situation of the property."

Mr. Justice Swayne, in delivering the opinion of the court in that case, declared principles which fully entitle us to the position of riparian proprietors. He referred to the survey in that case, thus:

"It will be observed that the beginning corner is on the bank of a river. The second corner is a point in the river. The line between them is a straight one. Where the course as described would have fixed the line, does not appear. There was an obvious benefit in having the entire fronts of the land extend to the water's edge. There was no previous survey or ownership by another to prevent this from being done. No sensible

reason can be imagined for having the two corners on the river, and the intermediate line deflect from it. Under the circumstances, we cannot doubt that the river was intended to be made and was made the west line of the survey."

The facts as quoted are the facts in this case, saving only that a river is referred to in the quotation, while in this case it was a lake, to which the surveyor ran in extending the side lines.

Mr. Justice SWAYNE in the same case said: "A call "for a natural object as a river, a spring, or even a "marked line, will control both course and distance. "* * * Artificial and natural objects called for, have "the same effect."

The reasoning of the opinion is very apt and complete in its application to the present case.

According to the decision just quoted the boundary of the plaintiff's land under the patent was the lake, and the grant extended to the centre of the lake. The plaintiff was therefore a riparian proprietor, and the accretions belonged to her, as the Supreme court of Illinois suggested in *Houck* v. *Yates*, 82 Ill., 182, *supra*, "*both by the* "*common and the civil law.*"

The Commissioner might, also, very well have said that the grant by the United States to John Holbrook was to be construed most strongly against the grantor.

When the United States surveyed the lands on the border of the lake and granted the same, its proprietary rights were at an end.

No indication of intent on the part of the United States to reserve to itself the lake after the survey of 1834 can be gathered from the plat of that survey; for the use of word "navigable lake" on the plat would rebut such in-

tent, since if the lake had in fact been navigable, an attempt at reservation by the United States would have been nugatory, according to the well understood doctrine of the rights of the State in respect to navigable waters: *Pollard* v. *Hagan*, 3 Howard, 212; S. C., Book 11 Lawyers' ed., *505; Martin* v. *Waddell*, 16 Pet., 410; S. C., Book 10 Lawyers' ed., 1,013. The use of the word "navigable" could not add to the title or proprietary interest of the United States.

Hence the law on this subject would not be overcome by the suggestion of Mr. Secretary Schurz in his communication of May 4, 1880, where he speaks of a portion of the township having been surveyed in 1834, and says of the survey that it embraced said "tracts as a part of a navigable lake." (Transcript, 92.) We should add that he seems to have been in error in supposing that the survey of 1834–5 was of but part of the township and left any lands unsurveyed therein. In fact the whole fractional township was surveyed, and no notice was given by the government on the plat or otherwise, as to any tracts being reserved.

When we consider, as is found, that the lake was not in fact navigable, a presumption of reservation by the United States when it sold the bordering lands has no better lodgment in the papers nor in the facts; for use of the lake would be supposed to be incident to the proprietorship of such bordering lands, giving rights to the plaintiff, not less but greater than if the lake had in fact been navigable.

In neither aspect of the case does there appear to have been any expressed interest of the United States to reserve the lake when the lands abutting it were sold.

Where did the proprietary right to the lake bed rest after the survey of 1834, and the sale by the United States of the bordering lands? If it rested in the plaintiff, the special findings do not support the judgment.

V.

SUCH PROPRIETARY RIGHT WAS IN THE PLAINTIFF, AS TO A PROPER PROPORTION OF SUCH LAKE BED.

Whether we consider that the State of Illinois has, by statute, declared that "the common law "of England, so far as the same is applicable "and of a general nature," shall, together with certain statutes of the British Parliament, * * * be the rule of decision, etc. (Rev. Stat. Ill., Sec. 1, C. 28), or whether we take the common law as binding upon the United States as concerning the sovereignty of the State in a case of this character, or as defining the effect of a grant by the United States of lands within the State of Illinois, we shall in either case be led to the conclusion that the United States did not reserve any part of the lake to itself when it sold the bordering lands.

On this subject POMEROY *in his work on* RIPARIAN RIGHTS, page 46, par. 32, says:

> "Over the public domain within a state, and the innavigable streams and lakes situated thereon, the United States has, therefore, only the rights of a proprietor. * * * Also an innavigable stream or lake lying within the public domain, is a part and parcel of the land itself, inseparably annexed to the soil, and the use of it is an incident to the soil, and as such passes to the patentee of the soil from the United States."

The official plat gave the lake as a boundary of our lands. The field notes show that the side lines were extended to the lake. The patent granted the lands ac-

cording to the official plat of such survey. This being so, our rights as shore proprietors carry us to the center of the lake. Therefore, Commissioner Burdett was in error in supposing that he was authorized to order a survey of the lake. The survey infringed upon our rights.

It is as if our land had been bounded by a non-navigable stream represented on the plat, or referred to in the field notes as the object to which the surveyor extended the side lines. We have seen that it is a general rule in such case that it requires an express exception in the grant, or something equivalent to such exception, to limit the owner to the edge of the water. (3 Kent's Com., * 428.)

"To rebut the general presumption there must be something in the language of the grant indicating an intention to exclude, or something in the subject-matter or the surrounding circumstances, from which such intention may be reasonably inferred."

Elphinstone on Interpretation of Deeds, 182–3, citing English authorities.

In *Howard* v. *Ingersoll*, 13 How., 381, 421 (Book 14 Lawyer's ed., *189*, *206*), which involved a question of boundaries, this court, by Mr. Justice NELSON, said:

"Grants of land bounded on rivers above tide water, or where the tide does not ebb and flow, carry the grantee to the middle of the river, unless there are expressions in the terms of the grant, or something in the terms taken in connection with the situation and the condition of the lands granted, that clearly indicate an intention to stop at the edge or margin of the river. There must be a reservation or restriction, express or necessarily implied, which controls the operation of the general presumption, and makes the particular grant an exception."

The principle is applicable to this lake. It has been enforced in many pertinent cases.

It was recognized by Judge Drummond in *Forsyth* v. *Smale*, 7 Bissell, 201, heretofore cited herein. The right

of the purchaser of public lands to take to the center of a lake was also affirmed.

By the act of Congress of May 18, 1796, it was enacted that "In all cases where the opposite banks of any streams "not navigable belong to different persons, the stream "and the bed thereof shall become common to both." Sec. 2,476, Rev. Stat. U. S; 1 U. S. Stat. at L., 468.

As to grants in general, this court, by Mr. Justice Catron, in *Jones* v. *Soulard*, 24 How., 41, (16 Lawyers' ed., 604.) fully recognized the doctrine that:

"From the days of Sir Matthew Hale to the present time, all grants of land bounded by fresh water rivers, where the expressions designating the water line are general, confer the proprietorship on the grantee to the middle thread of the stream, and entitle him to the accretions."

And this rule was applied by the court to a tract of land on the Mississippi river. It was held that the size of the river should not alter the rule.

In a late case, that of *Lembeck* v. *Nye*, 47 Ohio St.; S. C., 4 Lawyers' Rep. Anno., 578, the Supreme court of that state, by Mr. Justice BRADLEY, declared:

"In this State, where the rule is so firmly established that a boundary on a running stream carries the land to the middle or thread thereof, principles of analogy afford strong grounds for applying it to non-navigable lakes. The main reasons for the rule in one case apply equally to the other. The existence of 'strips or gores' of land along the margin of non-navigable lakes, to which the title may be held in abeyance for indefinite periods of time, is as great an evil as are strips and gores of land along highways or running streams. The litigation that may arise therefrom after long years, or the happening of some unexpected event, is equally probable, and alike vexatious in each of the cases, and that public policy which would seek to prevent this by a construction that would carry the title to the centre of a highway, running stream or non-navigable lake that may be made a boundary of the lands conveyed, applies indifferently, and with equal force, to all of them. It would seem, also, that whatever inference might arise, from the pre-

sumed intention of the parties, against the reservation of the land underlying the water, would be as strong in one case as in either of the others."

In *Bristow* v. *Cormican*, Law Reps., H. L., Vol. 3, p. 641, decided in 1878, the right of fishery in Lough Neagh was involved. That is the largest inland lake in Great Britain, and one of the largest in Europe, being from fourteen to sixteen miles long, and six to eight miles broad, and containing nearly 100,000 acres, with numerous islands of small and large area. The decision shows what is the common law of England as to the proprietorship of such inland lakes.

Lord BLACKBURN said, page 665, *et seq.*:

"The property in the soil of the sea and of estuaries and of rivers in which the tide ebbs and flows is *prima facie* of common right in the crown. But the property of dry land is not of common right in the crown. It is clearly and uniformly laid down in our books, that where the soil is covered by water, forming a river in which the tide does not flow, it is of common right to belong to the owners of adjacent land, and there is no case to show that the crown is of common right entitled to land covered by water where the water is not running water, forming a river, but still water forming a lake. * * * It is necessary to decide whether the crown has of common right a *prima facie* title to the soil of the lake. I think it has not. I know of no authority for saying it has, and I see no reason why it should have."

In *Lincoln* v. *Davis*, 53 Mich., 383, Mr. Justice CHAMPLIN, speaking for the court, made citations from the case in the House of Lords just now cited, and said:

"The holding that the crown does not of common right, *prima facie*, own the title to the soil under the waters of an inland lake leads necessarily to the other conclusion that such soil belongs to the riparian proprietor."

The law of Scotland on the same subject was declared in *Mackenzie* v. *Bankes*, 3 H. L. & Priv. Council, Pt. 2, p. 1322. LORD SELBORNE, p. 1338, *ib.*, said:

"Under titles such as those by which both the competitors in the present case hold (and when nothing turns upon any evidence of exclusive possession), the entire lake, if surrounded by the land of a single proprietor, belongs to that proprietor as a 'pertinent' of his land. If there are more riparian proprietors than one, it belongs, ratably, to them all. So far as relates to the *solum* or *fundus* of the lake, it is considered to belong in severalty to the several riparian proprietors, if more than one; the space inclosed by lines drawn from the boundaries of each property, *usque ad medium filum aquae* being deemed appurtenant to the land of that proprietor, exactly as in the common case of a river. But, for reasons which may be presumed to be founded in part, if not wholly, on the irregularity of configuration frequent in lakes, this *ex adverso* rule is not extended, by the law of Scotland, to these rights (such as boating, fishing and fowling), which are exercised in, or upon the surface of, lake waters. These are to be enjoyed over the whole water space, by all riparian proprietors in common, subject (if need be), to judicial regulation."

The right of fishery, of which those cases treat, is not a mere easement, but is a property right of the shore proprietor. *Cobb* v. *Davenport*, 33 N. J. (Law), 223; *Beckman* v. *Kreamer*, 43 Ill., 447.

This was so at common law, though some modifications of the right arose in early times in the Plymouth and Massachusetts Bay Colonies. *Cole* v. *Eastham*, 133 Mass., 65.

The rules of the common law on this subject are well stated by Depue, Justice, in *Cobb* v. *Davenport*, 32 N. J. (Law), 369; S. C., 33 N. J. (Law), 223. In that case the plaintiff claimed an exclusive right of fishing in the waters of Green lake or pond, a natural inland body of fresh water three miles long and one mile in width, and of sufficient depth to float large vessels. The defendant insisted that the plaintiff acquired no title to the *locus in quo* because the title to the lands under the waters of the pond was in the state of New Jersey. The court by Mr. Justice DEPUE, said, page 378 of 32 N. J. (Law):

"The policy of the common law is to assign to everything capable of ownership a certain and determined owner, and for the preservation of peace and the security of society, to mark by certain *indicia* not only the boundaries of such separate ownership, but the line of demarkation between rights which are held by the public in common and private rights. * * * In pursuance of this policy, by the common law all waters are divided into public or private waters. In the former the proprietorship is in the sovereign, in the latter in the individual proprietors. The title of a sovereign being in trust for the benefit of the public, the use, which includes the right of fishing and of navigation, is common. The title of the individual being personal in him is exclusive, subject only to a servitude to the public for purposes of navigation, if the waters are navigable in fact. * * * The conclusion is that the title to the soil under Green pond (in which there was no evident flow of tide, and which was therefore a private water), was in the plaintiff, and not in the state, and that the plaintiff acquired title to the bed of the pond by the grants under which he claimed, and might maintain an action of trespass for entering upon the waters or fishing therein."

The court said, page 379, that:

"All the cases in which waters above the ebb and flow of the tide, such as the great inland lakes and the larger rivers of the country, are held to be public in any other sense than as being subjected to a servitude to the public for purposes of navigation, are confessedly a departure from the common law."

As shore proprietors we should be allowed the usual advantages given to such proprietors whose lands border innavigable streams. That it should be supposed that it was the purpose of the United States to reserve lands covered by the waters of the smaller lakes, retaining the empty title thereto in order eventually to dispose of them, would be to suppose something inconsistent with the common rights of the States, and the citizens thereof, and especially inconsistent with the policy declared by the acts of Congress concerning public surveys, and with the rights of individuals who were invited to purchase the lands on the shores of such lakes, expecting some benefit from the lakes as well as from the small fractions purchased.

An express reservation by the government of such lakes in making sales of lands on their borders would be the very least that could be expected to sustain the theory under which this lake was surveyed in 1874. It would be a great inroad upon common law rights to adopt the principle that the United States, under its general grants of lands bordering on innavigable lakes, or non-navigable streams, any more than in respect to grants of lands bordering on the sea and our great lakes, retains the right to the bed from which the waters may subside; and yet such was the theory on which the survey of 1874 was ordered. It was not that there was any special reservation by the United States, nor that any notice had been given to those who purchased lands bounded by the lake that the United States was setting up such a claim of proprietorship to the lake. Such a claim could not have been anticipated. Its discoverer had not made the invention public. It was a novelty in 1874, and is still such a novelty that no just legal reasoning can sustain it. This lake was a private water. When the lands bordering upon it were sold the government had no remaining interest entitling it to act as naked trustee for anybody in respect to its bed, and had no authority, any more than a foreign nation would have had, to take away the lake bed, or the right of fishery, or the right to other benefits incident to shore proprietorship.

The question before us is, what is the common law right of a proprietor whose lands border upon a small inland lake, when common law rules, pure and simple, and free from any restriction whatever, are to be applied?

The *locus in quo* is in a State wherein such common law principles completely prevail. The findings show the boundary to be on the lake. This is confessedly so as to two of the tracts, and the statement as to those carries with it the same conclusion as to the other or third tract. The proof of shore proprietorship admitted as to two tracts gives the same right in respect to the other.

Well considered cases applying common law doctrines, have given such shore proprietors gores and jutting lands enlarging areas beyond the largest congressional subdivisions. *Shufeldt* v. *Spaulding*, 37 Wisc., 665, *supra*, is such a case, allowing the shore proprietor a gore of land in the lake outside of the legal subdivision if extended by the usual lines.

The point of decision in *Middleton* v. *Pritchard*, 3 Scam., 510, the leading case in Illinois in regard to riparian proprietorship, was, that under a grant from the United States of lands on the Mississippi river, the rights of the riparian owner extended to the center thread of the current. The plaintiff was therefore held to be entitled to recover for trespass upon an island, the area of which was not estimated in the survey. It was said:

"The consequence" of the doctrine of the common law is, "that all grants bounded by a river not navigable by the common law entitle the grantee to all islands between the main land and the center thread of the current."

Other expressions of the court in that case are quite apposite, as for example, the following:

"The grant is to be taken most strongly against the grantor. * * * We feel bound to construe grants by the government according to the principles of the common law, unless the government has done some act to qualify or exclude the right. * * * The United States have not repealed the common law as to the interpretation of their own grants, nor explained what interpretation or limitation should be given to, or imposed upon the terms

of the ordinary conveyances which they use, except in a few special cases; but these are left to the principles of law and rules adopted by each local government where the land may lie. We have adopted the common law, and must, therefore, apply its principles to the interpretation of their grant." (*Ib.*, 520–1.)

The learned justice who delivered the opinion used language which would indicate that the court intended to lay down a principle which would be equally applicable to all waters which were not navigable at the common law. He employed the phrase "stream or water" in earlier parts of the opinion, as a matter of indifference.

In a note to 3 Kent's Com., 427, note (d), strong commendation of the opinion from which we have just quoted, is expressed, as also of the opinion in *Morgan* v. *Reading*, 3 Smedes & Marsh., 336. The note says:

"These decisions in the courts of Illinois and Mississippi are highly creditable to their learning and independence; and it is consoling to meet with such frank and manly support of the binding force of the common law, on which American jurisprudence essentially rests."

The same doctrine was applied by this court in *Jones* v. *Soulard*, 24 How., 41, (*supra*).

It is believed that the principle has not been departed from in respect to lands bounded on any of our innavigable waters, save where the common law has not been held applicable thereto, or where grants have been affected by special conditions or considerations.

It is true that as recently as when Judge Cowen prepared the note (a) to *Ex parte* Jennings, 6 Cowen, 536, commenting at large, and with deserved commendation, upon Sir Matthew Hale's treatise *De Jure Maris*, consideration had been chiefly directed by the judicial mind to the rights of the crown or of the sovereignty and subject respectively in respect to tidal waters and such as

were navigable under the rules of the common law. Hence, that note did not treat of lands bounded by fresh water lakes. The principal case pertained to a grant of land bounded on Chitteningo creek, and the Reporter deliberately apologized for the length of his note. Much of what is therein stated is, however, pertinent to the matter now in hand. Some passages may, therefore, be quoted from that note:

"Within the sense given by Lord Coke the party whose lands bound him by any words on a river, or its margin above tide water, owns, of course, without any express provision in the grant, *usque filum aquae*. The right is incident and annexed by law to his grant. * * * The right or property * * * is by the common law annexed to the particular capacity of the party, or to some property of which he is the owner. * * * Thus where one owns the shore of the river above tide, by grant from the state, the common law (*common right*) annexes to his capacity as owner, the right of soil in the river *usque filum aquae*." (*Ib.*, 548.)

It will be well understood from a cursory review of the cases concerning inland waters, and especially lakes, that particular colonies and States of our union have adopted, by legislation on the subject, a special policy as to such bodies of water, abridging in some measure the rights of the shore owners. Such special policy, however, we should here remark has not received legislative sanction in Illinois, and even where, as in Massachusetts for example, the State has held such bodies of water in trust for the public, the dominion over them, while they have remained waters, has not been so exclusive as against shore owners as was held adversely to us in this case in the issuing of patents under which the defendant claims the lake.

It will be desirable, and necessary for the settlement of

this contention, that this court declare the principles by which the trial court should be guided upon a new trial. Of course, if we are right in the proposition that the United States did not make a reservation of the lake in selling, as the defendant's evidence, (Transcript 92; Rec., 171), shows the government did sell, all the lands surveyed in 1834–5, the defendant cannot have a legal interest in the division of the lake, for his patents must be delared to be void. Yet while, with reference to further action, we suggest that the riparian proprietor's rights extend to the center of the lake, we trust that the court will pardon the presentation later of some observations as to the rules for apportionment between the shore owners of rights or property incident to the position of their shore lands.

Some confusion has arisen in some of the cases pertaining to the lands bounded on fresh water lakes other than the great lakes regarded as seas. Such confusion is probably attributable in the main to two or three influences or considerations. One of these is, that in Massachusetts and other New England States the common law has not prevailed in respect to lands situated on what are called great ponds. In Massachusetts, great ponds not appropriated before the colony ordinance of 1647 to private persons, are public property, with some exceptions depending upon grants by the legislature or prescription:

Hittinger v. *Eames*, 121 Mass., 539.

Some courts which would have been expected to follow common law principles have overlooked this fact, and consequently have taken some of the Massachusetts or other New England cases as evidence of the common law in regard to this subject, and have therefore made

some departures which would not have happened if the basis of those decisions had been observed. This seems to have been the case to some extent in the reasoning adopted by Judge Gresham in *State of Indiana* v. *Milk* 11 Fed. Rep., 389. It was not, however, as we understand, at all necessary to decide in that case whether proprietorship of surrounding land would give ownership to any part of the bed of a natural non-navigable lake or pond. His Honor, Judge GRESHAM, referred to *Forsyth* v. *Smale*, 7 Biss., 201, as sustaining the principle that a person might, by purchasing lands surrounding a small lake, in view of its size and other circumstances, be held to own the bed. He suggested that each case depended largely upon its own facts. He then said:

"While a general grant of land on a river or stream, non-navigable, extends the line of the grantee to the middle or thread of the current, a grant to a natural pond or lake extends only to the water's edge." (*Ib.*, 395.)

To the cases referred to by the learned Judge, in connection with this proposition, we will make reference later. None of them, we may here say, seems to be predicated on or declaratory of common law principles applicable to private waters of the innavigable order.

We have said it was unnecessary to decide what would have been the rights of the persons who purchased from the State surveyed lots bordering on Beaver Lake. The case, as reported, was the decision of a demurrer to an answer which showed, in the opinion of the Judge, that the State of Indiana was estopped from claiming, as against Milk, any part of the lake involvedin that case. Therefore it was unnecessary to decide whether any part of the lake passed to Dunn and Condit by grant from the State. All, therefore, that was said in the opinion as to the effect of a grant of lands bounded by a lake was unnecessary to

a decision of the case. The reason, also, for distinguishing lakes from rivers, from the supposed difficulty of applying to lakes the rule that the riparian proprietor takes to the center, will be found not to have application in fact, and especially will be found to be unsupported by the authorities where the best consideration has been given to the subject.

State of Indiana v. *Portsmouth Savings Bank*, 106 Ind., 435, depended upon facts peculiar to that case. It pertained to lands within Beaver Lake to which the State of Indiana set up claim under the swamp land act of 1850, or under an act passed in 1873. The purchase by Dunn and Condit, which came into consideration by his Honor Judge Gresham in the case cited a few minutes ago, received special consideration from the court. It was held that when Dunn and Condit purchased from the State, which was after the passage of the swamp land act of 1850, their purchase was of lands which had been surveyed, and which were at that time subject to be sold by the State officials, but that the lake bed was not then in a condition to be sold, and that such officials had no authority at that time to dispose of it. Also, that of this lack of authority Dunn and Condit were bound to take notice, and that the grant of lands by these officials was to be construed strictly. The special circumstances of the case limited the rights of Dunn and Condit and of their grantees to the several surveyed subdivisions bounded by the lake. It was the same, therefore, as if there had been an express reservation by the State of the whole lake bed when the State sold the lands which had been surveyed on the lake border.

That the case last mentioned depended peculiarly on principles applicable to the swamp lands held by the State

appears from an express recital in the Opinion by Mr. Justice Zollars, where he said the court decided nothing in conflict with *Ross* v. *Faust*, 54 Ind., 471, and *Ridgway* v. *Ludlow*, 58 Ind., 248, and *Edwards* v. *Ogle*, 76 Ind., 302.

The second of those cases applied the principles of shore proprietorship on non-navigable streams to a non-navigable lake; and such we understand to be the rule in Indiana.

Rice v. *Stoner*, 6 Lawyers' Rep. Anno., 387; S. C., 22 N. Eastern Rep., 968, is an Indiana case, one of the latest on the subject, though we think that case requires some qualification as to which we wish to speak later.

In *Beckman* v. *Kreamer*, 43 Ill., 447, the plaintiff showed a legal or equitable title to the lands bordering on a lake. He brought suit for a violation of his exclusive right of fishery in the lake. The court, by Mr. Justice BREESE, said:

> "By the common law a right to take fish belongs so essentially to the right of the soil of streams or bodies of water where the tide does not ebb and flow, that if the riparian proprietor owns upon both sides of such stream no one but himself may come upon the limits of his land and take fish there; and the same rule applies so far as his land extends, to wit: to the thread of a stream where he owns upon one side only. Within these limits, by the common law, his right of fishing is sole and exclusive, unless restricted by some local law or well established usage of the State where the premises may be situate."

Washington Ice Company v. *Shortall*, 101 Illinois, 46, was a suit by a riparian proprietor for damages for removing ice from the bed of the Calumet river at a point where the plaintiff Shortall owned the shore on both sides. The court held him to be the owner of the bed of the stream, saying,

"By the common law only arms of the sea and streams where the tide ebbs and flows are regarded navigable. The stream above the tide, though it may be navigable in fact, belongs to the riparian proprietors on each side of it to its center, and the only rights the public has therein is an easement for the purposes of navigation."

"Chancellor Kent in his commentaries declares it as settled that grants of land bounded on rivers or upon low margins above tide-water, carry the exclusive right and title of the grantee to the center of the stream, subject to the easement of navigation, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river. * * * This rule of the common law has been adopted in this State and is here the settled doctrine."

Mr. Justice Sheldon, who delivered the opinion, referred to various cases supporting the doctrine thus declared. Some of those cases we have already cited.

The intimations given in *Bristol* v. *County of Carroll*, 95 Ill., 84, are to the effect that the same rule would be applied to land situated on a non-navigable lake. Mr. Justice Sheldon in that case, (*Ib.*, p. 91), suggests that the fee in alluvion would have belonged to the proprietor of the land bordering on the lake, "if the patent had purported to bound the land on the lake." But the land was not found to have extended to the lake.

The same state of facts existed in *Trustees of Schools* v. *Schroll*, 120 Ill., 509. In neither of the two cases last named was the land found to be bounded by a lake. Of the latter case, it should be said that the expressions used by the court as to principles applicable to conveyances of land lying upon the borders of still lakes having no outlets, were unnecessary, not being called for by the case. They were undoubtedly influenced by a failure to observe the non-applicability to Illinois of the several cases cited from the New England States and elsewhere. Had the case called for a decision of the point, it is not to be doubted that the court would have reached a decision

consonant with common law principles, and more in conformity with the suggestions made in *Bristol* v. *County of Carroll*, *supra*, and *Beckman* v. *Kreamer*, *supra*.

Among the cases so cited by Mr. Justice Shope *obiter dicta*, are *Seaman* v. *Smith*, 24 Ill., 521, which related to Lake Michigan; *Wheeler* v. *Spinola*, 55 N. Y., 377, which has not been followed in New York, and *State of Indiana* v. *Milk*, *supra*, which depended upon other considerations. They are inapplicable to non-navigable lakes in states governed by common law rules on the subject.

We invite attention to an article in the *Central Law Journal*, for July 8, 1881, Vol. 13, page 1, contributed by Judge COOLEY, and entitled: "The Title to Lands Under Fresh Water Lakes and Ponds." He says:

"In surveying the public domain for the purposes of sale, the Government caused all (lakes and ponds) that were too large to be embraced within a single subdivision of a section to be meandered at the water line, and the dry land only was measured for sale. The waters of many of these lakes and ponds are receding gradually, and some after a time disappear. Under these circumstances, the question who owns the bed is one of considerable importance in the Northwest, and is of interest in other parts of the country, though not so likely elsewhere to become the subject of litigation.

"So far as concerns fresh water streams the rule of the common law is clear and unquestionable. The owner of the bank owns to the thread of the stream, subject to the public rights of navigation, and perhaps of fishery; and he may make of it any use not inconsistent with the public easement. If there are islands in the river, they belong to the owner of the bank on whose side of the center they lie; or if they divide the main channel, they will themselves be divided in ownership between the bank proprietors. * * * If the bank owners do not own the bed of the stream, it will be conceded that it is owned by the State. Whenever the United States was original owner, the right passed to the State on its admission to the Union, with the full rights pertaining to the eminent domain. * * * If the State owns it as sovereign merely under the eminent domain, it is to be preserved, as the right of navigation is for the common benefit and enjoyment of the people."

Reviewing a number of cases, the writer referred to some in Massachusetts applicable to lakes and ponds, as depending upon the construction of the colonial rights and ordinances. He also referred to cases in New York, of one of which we have spoken as not announcing the law as it is now held in that state, *Smith* v. *City of Rochester*, 92 N. Y., 463, not having been decided at the date of the article. Reference is also made to a Vermont case as having followed a New York precedent. Next the writer spoke of *Seaman* v. *Smith*, 24 Ill., 521, (cited before), where land on Lake Michigan was held to be bounded by the line at which the water usually stands when free from disturbing causes; this being treated as the rule in that case because the lake was such that the rules that govern boundaries on the ocean were found to be the proper guides.

Some further cases are then commented upon, and the learned author says (13 Central Law Journal, 4):

"In Michigan it has been decided that the bed of those little lakes through which rivers flow, and which are in the nature of expansions of the rivers themselves, belongs to the bank proprietors, subject to the public rights therein. Judging from *dicta* in the decisions, it seems probable that the same rule would be applied to all other lakes."

Passing towards the close of the article, it is said (*Ib.*, page 4):

"If the bed is uncovered by the gradual recession of the waters, the land thus made or recovered belongs to the proprietor of that which adjoins it. Under this ruling, if a lake or pond gradually disappears altogether, the adjoining proprietors would become owners of the whole bed, and may find their possession increased to several times the original size. A like ruling has been made by the Federal Supreme court. In Michigan a like rule would probably be applied, whether the lake disappeared slowly or suddenly; and there really seems no reasonable ground for distinguishing the cases if obedience to precedent did not so require it."

Before closing the article the author says (*Ib.*, page 5):

"It is held that the right of fishing follows the ownership of the bed," etc.

Had the writer observed *Bristow* v. *Cormican*, Law Rep., H. L., Vol. 3, part 2, page 641, he would probably have remarked upon its applicability as showing the common law doctrine as to the ownership of the soil in a non-navigable lake. The decision was so recent when Judge Cooley's article was published that he probably did not have an opportunity to know of it.

Judge COOLEY suggests in this article that—

"except * * * as the suddenness of a change (from water to land) might render it difficult to adjust boundaries between adjacent proprietors of a bank (of lakes or ponds), there seems to be no sufficient reason why the state should claim title. But in truth the difficulty in extending the lines does not depend on the change being perceptible, or the reverse; it is solved as soon as it is determined by what rule the dividing line shall be extended from the original shore. If we apply the same rule that is applied to rivers, and extend them into the bed of the lake or pond at right angles to the general course of the shore at the point of intersection, the extension can be made as well, and as readily when the change is sudden, as when it is made by slow degrees and imperceptibly." (13 Central Law Journal, 5.)

In regard to the rule as to extending the lines, the suggestions of Judge Cooley answer quite fully some observations made in cases already cited herein, throwing out some objections to the application of common law rules as to riparian rights in lakes.

By analogy at least, and from a settled course of ruling as to the application of the common law, the Supreme court of Illinois may be said to have decided that no distinction should be made in this respect between the non-navigable lakes and the rivers of the state.

But we may say with Mr. Justice Miller, in *Yates* v. *Milwaukee*, 10 Wallace, 497:

"The law which governs the case is the common law, on which this court has never acknowledged the right of the State courts to control, * * * except, perhaps, in a class of cases where state cases have established, by repeated decisions, a rule of property in regard to land titles peculiar to the state."

The Supreme court of Michigan has passed upon the matter in a number of cases. These deserve *special consideration as expositions of common law principles.*

Rice v. *Ruddiman*, 10 Mich., 125, was decided in 1862. It related to land bordering on Lake Muskegon. The trial court had applied the same rule that would have been applied to lands on the border of Lake Michigan, to wit: that the boundary terminated at ordinary high water mark under a purchase or patent from the general government. The judges of the Supreme court (there being four members of that court at the time), delivered separate opinions, all of them concurring in the view that the trial court had erred, and that the rights of shore proprietorship were larger, and were the same as under the common law in regard to non-navigable rivers. All concurred in maintaining the common law rule applicable to fresh water streams above the ebb and flow of the tide. Mr. Justice Christiancy suggested that if there were intervening islands which the government had shown an intention to reserve from the grant of the main land, by surveying them as separate tracts, the riparian ownership would extend only to the center line between the islands and the main land. He said:

"To deny all riparian ownership under the shallow waters because its outward limits in the lake cannot *a priori* without reference to the facts of the particular case, be defined with a precision which shall settle all other cases, would be extremely unphilosophical, and contrary to the principles and analogies of the law in other cases." (*Ib.*, 140.)

He did not mean to say "that the ownership of a tract must * * * necessarily extend into the lake in the direction of the side

lines of the tract; this might depend upon the shape of the lake and the relative rights of the adjoining owners. * * * When the question arises between adjoining owners, it will not be difficult of decision within the principles of adjudged cases. * * * All the private or individual use and enjoyment of which the land is susceptible, subordinate to and consistent with the public right, belong to the riparian proprietor as against any other person seeking to appropriate it to his individual use. * * * I am not aware that the State or the Federal government has at any time asserted any right or claim to the beds of the lakes more than to those of the rivers, and I think the same principles of riparian ownership apply equally to both. * * * I must frankly admit that I have not, as yet, seen any sound reason for making a distinction based upon a difference of size between lakes more than between rivers, * * * nor because some may be a state or natural boundary, while others are not. * * * I think the general understanding and common usage of the country have as clearly recognized the principles of riparian ownership with reference to its lakes as to the rivers within the state. * * * To repudiate this common usage at this late day by creating an arbitrary distinction which has no foundation in the nature of things, and to recognize in the State or the United States a proprietorship in the beds of the hundreds of lakes and natural ponds within her limits, would, in my opinion, be an unwarrantable interference with private property, and do incalculable mischief. * * * If the lake belong to the State or the United States in one case, I do not see why it does not equally in others wherever it has been meandered by a public survey. Some startling distinctions would follow from such a doctrine. * * * There is much good sense in the observations of the Supreme court of Ohio, in *Gavit's Administrators v. Chambers*, 3 Ohio, 496, and they have met with a very general assent of the courts, especially in the Western States."

Campbell, Justice, in his concurring opinion, said: "Wherever use can be and is made of the bed of the water in improvements near the shore, in waters not governed by the artificial common law rules of tide-water ownership I think the rules applicable to fresh water rivers are more reasonable and just, and are certainly more conformable to the common understanding and usage."

In *Pere Marquette Boom Co.* v. *Adams*, 44 Mich., 403, decided in 1880, the trial court received evidence as to the ownership of certain booming grounds with reference to the value of property rights claimed. The defendant

was permitted to show that the land was in fact within the meander line of Pere Marquette Lake, as surveyed under authority of the general government: the theory of defense being that it had since become made land, and that therefore it belonged to the United States. The Supreme court of Michigan held that this was erroneous. Mr. Justice COOLEY delivered the opinion of the court. He said:

"It has been repeatedly decided in this state that private ownership of lands bounded on navigable fresh water is not restricted to the meander line. *Lorman* v. *Benson*, 8 Mich., 18; *Bay City Gas Light Co.* v. *Industrial Works*, 28 Mich., 182; *Maxwell* v. *Bay City Gas Light Co.*, 41 Mich., 453. If it were held that the owner of the bank did not also own the land within the meander line, it would belong not to the United States but to the state (*Pollard's Lessee* v. *Hagan* 3 How., 219), and it is notorious that the state never questions the right of the owner to the shore, but always concedes it."

In *Richardson* v. *Prentiss*, 48 Mich., 88, decided in 1882, the complainant asked equitable relief for the protection of certain riparian rights, she being the owner of certain premises running to Thunder Bay. The court by Justice MARSTON, declared:

"In this state, whatever the law may be elsewhere, the principles as to the rights of proprietors of lands lying on fresh water rivers have been applied to lands fronting upon the lakes." (*Ib.*, 92.)

This was a direct adoption of the rule that a grantee bounded on a river goes *ad medium filum aquæ*. A quotation from Angell, on "Water Courses," Sec. 17, was also made: "And there seems a distinct and strong tendency "in the cases to turn every doubt upon expressions which "fix the boundary next the river in favor of a contact with "the water." (*Ib.*, 91.) Also a further reference to a principle laid down by the same writer: "And when a grant of land refers to a map upon which the land is laid

down as bounded on the water-course, the grantee is entitled to hold to the center." (*Ib.*)

In *Webber* v. *Pere Marquette Boom Co.*, 62 Mich., 426, decided in 1886, the plaintiff claimed certain lands by virtue of patents from the United States covering a supposed island in Pere Marquette Lake. The Commissioner of the General Land Office ordered a survey of the island in 1883. The proceedings for the survey were the same as in the survey of 1874, in the present case.

The defendant produced patents from the United States issued under a survey made in 1838, including lands on the border of the lake, sold about 1850, to George Farnsworth. Through him the defendant deduced title. The court held that:

"There existed no authority for the Commissioner of the General Land Office to order a survey of this body of water on the hypothesis that it was a part of the public domain which had been omitted from the Government survey. From the character of the premises in dispute, as being water instead of land, we are of opinion that the United States parted with its title when it conveyed the lands to Farnsworth bordering upon this body of water. It is the settled rule in this state that the title of the riparian owner extends to the middle line of the lake or stream of the inland waters."

The court then quoted a large number of cases, and said:

"This has become a rule of property in this state, and the Supreme court recognizes the right of each state to determine the doctrine for itself."

The court held that the patents under the second survey conveyed no title, because the United States had conveyed the lands on the lake to Farnsworth, the defendant's grantor, and that such patents conveyed the *locus in quo* according to the principles recognized in Michigan as applicable to the riparian proprietorship.

This decision was predicated on the rule laid down by this court in *City of St. Louis* v. *Myers*, 113 U. S., 506, where Mr. Justice Waite said as to the rights of riparian ownership: "They are left to be settled according to the principles of the state law."

Clute v. *Fisher*, 65 Mich., 48, was decided in 1887. It was trespass *q. c. f.* for entering upon land covered with the water of the lake, and cutting and hauling away ice. The defendant raised a question as to the title of the plaintiff. The plaintiff was found to be the owner of certain fractional subdivisions of section 14, bordering on the meander lines of the lake, and the Supreme court held that he must be considered the owner of the land under the lake on such section, stating:

> "It has been held in this state that the soil under the water of the inland lakes in this state does not belong to the general Government or to the state. *Rice* v. *Ruddiman*, 10 Mich., 125, (other citations follow). It has also been repeatedly decided in this state that private ownership of lands bounded on navigable fresh water is not restricted to the meander line. (Citing authorities.) This doctrine must also apply to the small inland lakes in this state by analogy, whether they can strictly be termed navigable or not."

If the United States, while still retaining the proprietorship of the lands bordering on Wolf Lake, had caused the lake to be surveyed, and had sold the lake bed lands first, a different question would have been presented. The purchaser of the lake bed lands might then be in the position of the defendant in *Hodges* v. *Williams*, 95 N. C., 331, where, however, the doctrine maintained by us was laid down by the court.

We have already referred to *Warren* v. *Chambers*, 25 Ark., 120; S. C., 4 Am. Rep., 23, as to the title of the owner of lands bounded on a lake to land left dry by the receding of the waters. The case was decided in 1867,

and passed squarely upon the question of the title to such lands. It is to be classed among the cases which determine the common law on the subject.

In treating of the common law rights of the proprietors of lands bordering on non-navigable waters in Illinois, we have shown the adherence of the Supreme court of that state to the common law. We have also shown that those principles have been recently applied by decisions in England as to lakes in Ireland and Scotland.

From the decisions quoted, including opinions delivered in the House of Lords and the Supreme courts of Illinois, Ohio, Indiana, Michigan, Wisconsin, New York and other states, there is no doubt as to the applicability of the common law doctrine to non-navigable lakes, as well as to non-navigable rivers, in respect to the rights of shore proprietors. That doctrine has been very fully stated and enforced with reference to the right of fishery in New Jersey. Wherever it has been met with any dissent this has been from mistake in the application of cases, or because of local ordinance or regulation, or a special state of titles, giving some of the towns or *states*, for example those of New England, proprietorship of inland lakes or great ponds, or larger control over the same than was given by the common law to the sovereign or municipality. The common law principle as to shore proprietorship upon waters above the ebb and flow of tide, is maintained in nearly all the states of our Union. In a few of the states, as in Iowa, as this court has observed, streams navigable in fact have been treated by the courts as if navigable at the common law, there being in this respect a departure from the common law, such a departure as has not been made by the Supreme court of Illinois, and in those states the riparian pro-

prietor goes to low water on streams navigable in fact, and the bed is held by the state in right of sovereignty, (2 Smith's L. C., 6th Am. Ed., 244); but in non-navigable waters riparian rights give title extending to the center of the body. When the courts of any of the states have intimated a doubt as to applying the common law rule *usque ad filum aquæ* to non-navigable lakes, save in the New England states where local regulations as to great ponds arose in early times, the intimation has been attributed to a supposed difficulty in applying to such bodies of water the rule applied to non-navigable rivers. In fact, however, a careful examination of the cases will show that the exception has not been applied to any considerable extent, but has been stated or based upon *dicta* only. In some of the authorities herein above quoted, it is well held that the principle of admitting private ownership of the soil to the center of lakes should not be abandoned because of difficulty in applying it to some lakes. The courts have found that the difficulty is rather imaginary than real, and that the imagination of it has grown out of some want of attention to the principles governing the true rule of division.

VI.

WHAT DIRECTIONS SHOULD BE GIVEN FOR DIVIDING THE LAKE BED, TO SECURE TO THE PLAINTIFF HER PORTION AS A RIPARIAN FROPRIETOR?

A minute examination of the authorities containing or relying upon *dicta* adverse to the general proposition that the elements of the rule as to shore proprietorship on the non-navigable lakes are the same as those of the rule applied to such proprietorship on non-navigable

rivers will not be expected. All such waters, in states in which titles come from the United States, are private waters, subject at first, or during government ownership of the public lands, to the action of the government in surveying and selling such lands. They remain private waters in those states when the government parts with its title to the public lands. This is so according to the doctrines of the common law wherever expounded.

In referring above to the opinion of his Honor, Judge Gresham, in *State of Indiana* v. *Milk*, 11 Fed. Rep., 389, it was suggested that we should again notice some cases named by the learned Judge as inclining him to limit boundaries or riparian advantages to the low water line on the small inland lakes. The matter, we may with permission repeat, was one which did not pass into final judgment on that record. It was unnecessary to the decision of the case. But as to the cases so cited we have two or three observations.

For example, *Wheeler* v. *Spinola*, 54 N. Y., 348, was cited as indicating that in that state a riparian proprietor of lands bounded upon a natural pond or lake, is limited to low water mark. It would not have been strange if titles in some parts of New York, as connected with grants from Massachusetts, had been so found. In fact, however, the case did not involve the question. The commission of appeals decided therein two matters: 1. That the plaintiff's evidence as to some acts of possession by him did not justify a charge that he was entitled to recover, p. 387, *ib.* 2. That the deed under which he claimed did not, from its own words, cover the *locus in quo*, which was outside of the natural limits of the pond. p. 387-8, *ib.*

The pond, which was called Flax pond, *had been divided up between owners as early as 1815.* The plaintiff claimed by *mesne* conveyances under a deed from the town dated in 1819 *covering part of the bed of the pond. But such bed did not embrace the locus in quo.* The water did not in the natural state of the pond go so far. The ground was sometimes covered at flood tide, but only because of salt water having been let in, and that did not make land for the plaintiff. He showed no title whatever to the land thus flooded, nor was there in fact any question requiring a decision as to riparian rights. No expression by Commissioner Earl as to the law on that subject was called for by the case.

By way of contrast we have already referred to *Smith* v. *The City of Rochester*, *supra*, as an exposition of the common law as applied to New York.

We deem it unnecessary to review in detail the other cases cited in the same connection by the learned Judge. Those from Massachusetts, Maine and New Hampshire are, as we have seen, confessedly departures from the common law, resulting from local enactment or regulation. As to the extent of such departure see *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass., 548, 559. Of Wisconsin and Illinois cases thus cited, one from each state depended upon principles applicable to the great lakes as inland seas. One of the cases from Wisconsin, *Mariner* v. *Schulte*, concerned boundaries on a bayou, and the holding was that the center thread was the boundary. The other case from that state, it being *Boorman* v. *Sunnuchs*, does not seem to have given due consideration to the common law, and at the same time could not be taken, when considered with reference to other Wisconsin cases, as denying riparian rights as to reliction and otherwise.

But as to New York law, *Smith* v. *City of Rochester*, 92 N. Y., 594, hereinbefore cited, may be said to have settled the common law doctrine for that state, as to riparian proprietorship of the beds of non-tidal waters. The court arrived at the conclusion that all rights of property to the soil under the waters of Hemlock lake were acquired by and belonged to its riparian owners, while such rights only over its waters belong to the state as pertain to sovereignty alone.

It was said that peculiar reasons governed the action of the legislature in assuming the ownership of the lands under the waters of the Mohawk and Hudson rivers above tide waters. The titles granted to the original settlers in the Hudson and Mohawk valleys, as construed by the rules of the civil law prevailing in the Netherlands, from whose government those titles were derived, did not convey to their riparian owners the banks or beds of *navigable streams*, and in such cases it had been held that as a consequence of the revolution the State of New York succeeded to the rights of the mother country, and such settlers were confirmed only in the rights *originally acquired by them.* But when it came to be a question what was the effect of riparian proprietorship under the rules of the common law, the court of appeals declared its opinion on that subject with no uncertain words.

The case to which we have just referred has been followed, as we understand, by *Crooked Lake Navigation Co.* v. *Keuka Navigation Co.*, 4 N. Y. St. Reporter, 380, declaring that:

"The rule is that the riparian owners of land adjoining fresh waters, non-navigable, and navigable streams and small lakes within the state, take title to land involving the water upon the premises. The public has an easement in such waters for the purposes of travel, as upon a public highway, which ease-

ment, as it pertains to the sovereignty of the state, is inalienable, and gives to the state the right of regulating and controlling the waters for the purposes of navigation."

Looking to the New England cases, for example, to those of Massachusetts and other states following its decisions, it is at least a fair matter of inference that such inland bodies of water were, in early times, governed by the principles of the common law, and that riparian proprietorship followed the rule *usque ad filum aquæ* until 1641, when the *Body of Liberties*, § 16, was adopted. It gave the right to the householders to have free fishing and fowling in great ponds and bays, coves and rivers, unless the freemen or the general council had otherwise appropriated such waters. The purpose of the article seems to have been to abolish the laws designed to secure several and exclusive fisheries, and to make them all free. It was observed by Mr. Justice Hoar in *Inhabitants of W. Roxbury* v. *Stoddard*, 7 Allen, 165, that the freemen of the town or the general court had before then granted a certain fresh pond. The drift of affairs seems to have been such, after the adoption of the *Body of Liberties*, section 16, that the privileges allowed by said article 16 became more general and more established in the towns and their inhabitants, and it was, consequently, determined by the courts that the great ponds had been devoted to public use, as per *Cummings* v. *Barrett*, 10 Cush., 188. Mr. Justice Hoar, however, in 7 Allen, 168, remarked that the Supreme court of New York had held in *Ledyard* v. *Ten Eyck*, 36 Barb., 102, that a lake measuring less than a mile in width by five miles in length, and having no navigable outlet, would pass under a grant of a large tract of land, which included it in its boundaries; but further remarked that New York, however, had no

statute similar in its provisions to the Massachusetts ordinance.

Here we get to the root of the matter. It required an ordinance, or something similar to a statute, to toll the common law. We may, therefore, put aside any intimations that would lead to the rejection of the common law in a state which admits it to be in full force, and which has enacted it in fully as strong terms, if not stronger, than those suggested in *Smith* v. *Rochester*, *supra*.

The same reason which is assigned in Massachusetts for peculiarity of doctrine, or departure from the common law, has been expressly assigned in Maine in *Parker* v. *Cutler Milldam Co.*, 20 Maine, 357. So also like legislative construction in New Hampshire was referred to in *State* v. *Gilmanton*, 9 N. H., 461, though the case did not concern land on a lake or pond.

If Illinois had chosen to enact a law similar to section 16 of the *Body of Liberties*, the policy of that state might thereafter have been inferred to be adverse to the adoption of the rules of the common law as to small fresh water lakes within the borders of that state. But to be availing as to Wolf Lake, such enactment would have had to precede the purchase of these lands by John Holbrook. His acquisition having been under and subject to the rules of the common law, the courts of Illinois would not, nor would this court, deprive him of rights acquired before the passing of any such special law. The preservation of previously acquired rights was not omitted in the adoption of the *Body of Liberties*, Sec. 16.

Is there, however, difficulty in applying rules of the common law to the lake represented by the official plat in the present case? Shall not the riparian proprietor go

to the center of the lake? The objection thrown out is that it would be difficult to make the division. What is the rule, however, under which it is to be made? Several cases on this subject will be noticed.

In *Kehr* v. *Snyder*, 114 Ill., 313, certain lots or parcels of land bordering upon the Mississippi river became the property of various persons. The court in declaring how accretions along the river front should be divided between these persons, held that it was proper to measure the entire river front as it was found to be when the lots were laid out, and then note the aggregate number of feet frontage as well as that of each lot; that a line should be drawn as nearly as might be with the middle thread of so much of the stream as was opposite the shore line so measured, and the thread line should be divided into as many equal parts as there were lineal feet in the shore line, giving to each proprietor as many of these parts as his property measured feet on the shore line, and that the division should be completed by drawing lines between the points. As a general proposition the side lines between the adjoining riparian owners are disregarded. (*Ib.*, 317.)

In *Rice* v. *Ruddiman*, 10 Mich., 125 (*supra*), the court held that even where it was difficult to make the precise line under a general rule, the law did not deny the right of the parties. The court intimated that a proper rule would be found in view of special circumstances, declaring that:

> "If the water of Muskegon lake continued so shallow as to render the lands under it susceptible of beneficial private use to the center line of the lake, the riparian proprietorship extended to such lands, and that although there were many classes of cases in which the precise line of boundary could not be drawn by any general rule applicable alike to all cases, the law did not therefore deny the existence of both public and private rights, nor either of them."

The court intimated that the question of division in such a case might depend upon the shape of the lake and the relative rights of adjoining owners, and that when the question arose between the adjoining owners it would not be found difficult of decision within the principle of adjudged cases. (*Ib.*, 140.)

In *Wonson* v. *Wonson*, 14 Allen, 71, rules for the division of certain flats between the proprietors of the upland were laid down by Mr. Justice Gray, speaking for the court.

The matter is there treated with fullness with reference to various decisions in that state. It was suggested that the proper rule was essentially the same as the "rule by "which accretions by alluvion on the bank of a river or "lake are divided among the riparian proprietors," citing

Deerfield v. *Arms*, 17 Pick., 41.
Hopkins' Academy v. *Dickinson*, 9 Cush., 552.
Jones v. *Johnston*, 18 How., 150.
S. C., 1 Black, 209.
3 Kent's Com., 6 Ed., 428.

Reference was made to cases in which the court had been induced by the shape of the shore to adopt the base line of a cove, instead of the line of low water, as the line upon which to fix the proportional width of each parcel of flats. (*Ib.*) It was said:

"In ascertaining the length of the line, either at high-water mark or at low-water mark, *the general line ought to be taken*, and not the actual length of the line, if it happens to be elongated by deep indentations or sharp projections." (*Ib.*, 89.)

Clark v. *Campau*, 19 Mich., 325, cites a number of cases showing the method resorted to in making allotments to riparian owners, both on rivers and other waters. Mr. Justice CAMPBELL said, page 329, *ibid.*:

"In none of the cases has any regard been paid to the lines on land; * * * the principle which recognizes the shore line, and not the back lands, as governing, is recognized and enforced," etc. "Where the stream is straight, the water front will be bounded by lines drawn at right-angles with the thread of the stream protracted until they reach the ends of the shore line. Where the streams curve, the same principle applies, and the lines running from the shore would converge or separate according as the land lay within or out of the curve. * * * The aim in every instance has been to secure to each owner such share as was indicated by his shore line, and not by his lands back of it."

Lincoln v. *Davis*, 53 Mich., 375, *supra*, concerned riparian rights in Thunder Bay, a portion of the waters of Lake Huron. The court considered that the bay was to be classed with the great lakes, or technically navigable streams, but fully recognized the common law right of the owner of land bordering on a non-navigable lake of fishing in front of his land to the center of the lake. In reviewing the law on the subject, Mr. Justice Champlin, in his opinion, after citing numerous authorities, says: "Riparian rights exist on the banks of waters whether "navigable or not navigable, whether subject to ebb and "flow of tide or not." (*Ib.*, 388.)

But the waters of Thunder Bay being public waters, the right of fishing therein was held to be a common right of all the citizens of the state, subject only to the paramount right of navigation and to legislative control. The Michigan statute on the subject was construed to protect the defendant in an exclusive right of fishing within one mile from the shore of his land on Sulphur Island in said bay. In a separate opinion by Mr. Justice Campbell, concurring with the other members of the court, allusion was made to two difficulties in the way of defining certain rights of riparian proprietors. He said they had a right to make such use of the covered lands adjacent to those

bounded by the lakes as would not injuriously affect navigation, and that it depended upon the law of the state how far rights might be exercised consistently with the public easement of navigation in the submerged lands. He regarded it as settled by the common law of the state that such rights extended so far as they could be reasonably enforced and identified. The difficulties to which he referred were these:

1. The defining of boundaries where there is no *filum aquæ*.

2. The larger control which the state has in public waters than it has over strictly private waters.

But the learned Judge said:

"In carrying out lines of ownership in narrow streams it is easy to find the general course of the stream, and to draw lines perpendicular to that course from the terminal shore lines. But on lakes all lines from the shore tend to converge in some central part of the lake, and while irregularity of shape prevents drawing them to a common center, they must, if protracted, cross each other in a perplexing way. The rule adopted in such waters where the whole surface could be appropriated has always been to divide the water area in proportion to the shore frontage, and never to attempt any division by lines run from the shore except over such parts of the lake as are substantially adjacent to the shore." (*Ib.*, 390.)

There is a class of cases in the Michigan reports, and also there is an Indiana case, appearing to suggest, by way of analogy from the subdivision of public lands, a method of division among riparian proprietors which should not be applied in this case. The method so suggested is by extending the lines of fractional subdivisions so as to give them the full complement of a regular subdivision unaffected by the causes which led to making them fractional in the first instance. These cases, if applied to Wolf Lake, would be departures from the principles of the common law as to the rights of riparian proprietors.

Perhaps in some of the quite small lakes the departure might not be great, but it would here be quite marked.

Grouping together

Keyser v. *Sutherland*, 59 Mich., 55,
Palmer v. *Dodd*, 64 Mich., 474,
Clute v. *Fisher*, 65 Mich., 48, and
Stoner v. *Rice* (Ind.), 6 Lawyers' Rep. Anno., 387.

we make some note of their facts and suggestions. The two former of these cases did not concern riparian rights. Practically the second of these cases did not present any question of riparian law. The grouping is of cases somewhat alike in reasoning as to what constitutes a legal subdivision of the public lands. The Michigan cases on this subject professedly follow a suggestion of *Brown's Lessee* v. *Clements*, 3 How., 650, as to a matter therein held, but in respect to which this court has announced a contrary doctrine in *Gazzam* v. *Lessee of Phillips*, 20 How., 372. Under this, the later ruling in this court, the power of the surveyor general to make fractional subdivisions of irregular size was declared. Both cases in this court pertained to land, and not to riparian rights. But in *Keyser* v. *Sutherland*, *supra*, the Supreme court of Michigan intending to follow a suggestion in *Brown's Lessee* v. *Clements*, since in this particular overruled, held that the surveyor general could not lawfully extend a south fraction north of the east and west quarter line of the section, and commented on the policy of the law as to subdividing lands, as far as possible, into *square figures*. The same general doctrine was announced by the same court in *Palmer* v. *Dodd*, *supra*.

These cases were, however, referred to in *Clute* v.

Fisher, *supra* (p. 51 of 65 Mich.), as furnishing a guide for determining bounds in riparian proprietorship, the court by Mr. Justice Morse saying, in view of the situation with reference to the public surveys of a certain small lake, which was meandered as on the south-east quarter of section 14, the north-east quarter of section 23 and a small portion of the north-west quarter of section 24, that the owner of Sec. 24 could extend his riparian ownership of the soil no further than the line of said Sec. 24 as it would run if extended through the lake, and that the true rule was "to invest the holder of the title of any "fractional subdivision of a section bordering upon the "lake with the ownership of the bed of the lake to the "lines of said subdivision as they would be if continued "through or into the lake."

He referred to this as a method of determining a conflict between riparian proprietors. Yet his Honor further said:

"In case of a body of water so large that the lines of the sections or subdivisions of sections held by the proprietors of lands adjacent or surrounding said lake, if extended, do not embrace the whole of said lake, then the rule of riparian ownership may be extended to the center line of said lake." (*Ib.*, 52.)

The extension last stated would be conformable to the principles of the common law, and at the same time in harmony with the expressions of this court which had not apparently been observed by the Supreme court of Michigan in making its decisions, and we should say there is a serious question whether the size of the lake would justify a departure from the general rule of the common law.

In *Stoner* v. *Rice*, 6 Lawyers' Rep. Anno., 387, *supra*, Mr. Justice Olds suggested that:

"It was to be supposed (as to the purchase from the government of lands lying on such a fresh-water lake as was there under consideration) that the purchaser took title to it as riparian owner with the right to the land as the water receded within the boundary lines of the subdivision conveyed to the purchaser. In other words, the purchaser acquired title to all the land within the subdivision though it was described as a fractional subdivision or lot."

The learned judge thought two of the Indiana cases supported this rule. It would seem, however, that those cases depended on their special facts, and did not apply the rule supposed, nor require a departure from common law precedents. We submit that the proposed adoption for lake division of legal subdivisions is an unnecessary departure from common law principles, and should not be followed. In the particulars named the Supreme courts both of Michigan and Indiana seem to have made announcements which would not be good as precedents for Illinois, nor as to Wolf lake.

The application to Wolf Lake of the rule announced in the two cases last mentioned would not make either a legal or an equitable division as between the different riparian owners. It would be a much wider departure from the principles laid down by this court as to riparian rights than would apparently have happened in the two cases just cited, that is to say, a greater departure from the rule by which accretions by alluvion are divided among riparian proprietors, the general line of shore boundary being taken into consideration in extending lines to or towards the center of small inland bodies of water. The application here of the two cases under criticism in respect to the announcements therein of a necessity of squaring out legal subdivisions would, for example, extend fractional section 29, originally but 7.37 acres, into 640 acres, and so as to other fractions, with the result on the whole,

that the division would not be in correspondence with the length of shore lines. An extension as for a full legal subdivision of the S. W. of 20, in this township, would operate similarly to give it a large part of the lake at the expense of the owners of adjacent tracts, as for example, the N. W. quarter of the same section having a much longer shore line. A study of the map of this lake will commend the common law principles of division as superior in equity, in respect to this lake, to the rule proposed by the learned judges in the cases specified.

The legal subdivisions in this case were such as were made under the survey of 1834–5, and it would be anomalous to suppose that their enlargement to meet receding waters was to correspond arbitrarily with what they would have been, as congressional subdivisions, if the lake had not caused a change in the form of such subdivisions.

It will be expected that this court will announce the general principle governing the case, and especially that the patents under which the defendant claims were not authorized by law. The plaintiff will thus be found to be the owner of the lands under the waters of the lake to the center of the lake, leaving it to the shore owners to settle between themselves, in an appropriate form, the ownership of the bed of the lake.

Common law principles entitle us to riparian rights, and consequently to a proprietary title extending to the center of the lake.

This court can determine the general principle. In doing so, the first inquiry will be, were our lands bounded by the lake? This inquiry was answered by the trial court affirmatively as to two of the tracts, and on facts

practically the same, should have a like answer as to the other tract.

This tract, though originally so small, is entitled to equal consideration with the other tracts to the extent of its ratio of riparian interest. It is for the court to declare whether the United States reserved to itself the proprietorship of the lake after it sold the lands bordering thereon, and properly granted the same to the persons through whom the defendant claims. This matter is a necessary one for decision. While the trial court declared our right as to two tracts to go to low water, what is the worth of that declaration if the defendant takes all the water and the land under it? Where would be left our right of fishery or riparian rights in general? The contention of the defendant is for the lake, and unless Commissioner Burdett could give it to him, he has no title, and the plaintiff must prevail.

The court will find, from the special findings, that the lake as represented on the official plat of the survey of 1834–5, and from the field notes of such survey, was one lake; that the lands on its borders were regularly surveyed as being bounded in part by the lake, and were so conveyed as to carry with them the usual riparian rights recognized by the common law, and that no proprietary rights remained in the United States to be conveyed by the junior patents set up by the defendant in his attempt to take away the lake from the plaintiff.

To support the survey of 1874 and the defendant's claim thereunder it would be necessary to determine that the United States reserved the lake when the lands on its border were sold. But there was no such reservation, and therefore, no proprietary interest remained in the

United States. Where, then was such proprietary interest? It was under common law principles in the shore-owners, as was said in *Smith* v. *Rochester*, *supra*. The United States could not, therefore, make or cause to be made any additional legal subdivisions, for the riparian owners were alone concerned in the division, if any were required. This depended upon state law, which in this case was the common law. By the principles of that law our rights were defined. Therefore, we ask the court to hold that our three tracts had the lake for a boundary, and that as a riparian proprietor we had title to the center of the lake.

The prolonged controversy which has resulted from the act of a high official of the government may be appropriately set at rest by a direction to disregard the junior patents, and to give full effect, as under the common law, to the senior patents under which the plaintiff holds.

Respectfully submitted.

THOMAS DENT,
For Plaintiff in Error.

FILED.
JAN 15 1891
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

No. 161.

GERTRUDE H. HARDIN,
Plaintiff in Error,

vs.

CONRAD N. JORDAN,
Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

W. C. GOUDY,
FOR DEFENDANT IN ERROR.

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CHICAGO:
BARNARD & GUNTHORP, LAW PRINTERS.
1891.

STATEMENT.

MAY IT PLEASE THE COURT:

In order to state what lands are involved in this suit, it is necessary to refer to the pleadings.

The first count of plaintiff's declaration simply describes the fractions on sections 19 and 30 by their government descriptions, with the following additional language: "Together with the accretions and relictions forming a "part thereof." Defendant interposed a demurrer to this count, and the court held the quoted language as without force and that the count was only good so far as the specific descriptions were concerned. (Rec., 39 and 40.). There was no amendment of this count, so that at the time of the trial, it only described the original fractions on 19 and 30.

Subsequently, an additional count was filed which described the "S. E. 1–4 Sec. 19, N. E. 1–4 Sec. 30, and "S. E. 1–4 of Sec. 30," etc., as full quarters, with the following additional language: "With all accretions, al- "luvions and relictions, to wit: all the land lying between "the west boundary line of said south-east quarter of "section 19 and the west line of said north-east quarter of "section 30, and the middle line of the permanent water "of the lake east of said line, sometimes designated and "known as 'navigable lake' and sometimes as 'Wolf "Lake,' and also all of the land lying between the sec- "tional lines of said south-east quarter of section 30 and "said lake." (Rec., 46 and 47.)

The plaintiff's declaration consisted solely of these two counts at the time of trial.

The first government survey of lands in this township

was made in 1834 and 1835. By a mistake, either accidental or otherwise, the surveyor making the survey for the government ran a meander line, thus omitting from the survey more than one thousand acres of land, which was in 1874 surveyed by the government, and defendant, Jordan, at the time of the commencement of this suit, held the title in fee under this latter survey of all of the lands lying east of plaintiff's fractions on sections 19 and 30. The plaintiff claimed no title thereto, except by virtue of his fractional tracts on said sections.

It is admitted, and was found by the court, that plaintiff was seized in fee of those fractions. (Rec., 52 and 62.)

The court also found in his special findings, that there was always a body of land running in a north-easterly and south-westerly direction from the north-easterly part of the south-west quarter of section 20 to about the south-west corner of section 29, entirely dividing (except in times of high water) the waters of what for many years has been known as Wolf and Hyde lakes.

That the ridge on this dividing land was "covered with "trees—oak, hickory, elm, ash, poplar, linden, and hack-"berry—three feet in diameter and under." (Rec., 57.) That the ridge, with the exception of a slight depression at a point about 140 rods south from the meander line, at the north is continued and of the same character for a distance of 220 rods from the meander line at the north end; that the growth of vegetation from tbe southern extremity of said ridge to its reappearance further south, and for a distance of eighty or ninety rods, is the same as a like growth along the margin of the lake; that this belt of land separated the waters of what is called Hyde Lake on the west from those of Wolf lake on the east, except at times of high waters that at the south end of this belt

of land the land is higher from the meander line north for thirty rods or more; that upon the entire western margin of Hyde lake, extending from twenty to twenty-five rods east from the meander line west of Hyde lake as well as upon the margin of the lakes along the belt of land above described, as well also, as in the more depressed portions of said belt of land, swamp grass grew; that the physical condition of the land west of the meander line, which the court holds was a boundary of the 2.04 acres, described as the south-east fractional quarter of section 30, for a distance of ninety-one rods or more is also of the same character; that the greater portion of plaintiff's said 2.04-acre tract is wet and unfit for cultivation and only slightly higher than said lands to the west of it; and that the point at which the open waters of Hyde lake cease and marsh grass begins is some distance north of the south line of section 30. (Rec., 57 and 58.)

The court also finds that: "*The physical conditions of the "land and water are substantially what they were at the "time of the original survey, and that said lake or lakes "are not navigable waters.*" (Rec., 57 and 58.)

These specific special findings of the court with respect to the physical condition of this body of land running between Wolf and Hyde lakes, so-called, and also with respect to the physical condition of Hyde lake and the land west of it inside of the meander line, fully verify the map which is hereinafter printed. (Rec., 57 and 58.)

This case was tried before Judge Gresham, a jury being waived in writing, and the court made special findings. (Rec., 48 and 52 *et seq.*)

These findings of the court are, therefore, to be taken as true and cannot be drawn in question in this court.

In further verification of the map introduced in evidence by the defendant, the commissioner of the general

land office, in an opinion introduced in evidence, says that: "Notwithstanding the surveys of 1835 treats the "body of water as a whole, with no division between "what are now called Wolf and Hyde Lakes, there was "in 1850 a strip of timbered land running from the "border of the lake, in section twenty, south-westerly to "its border, in section twenty-nine, thus dividing it into "two parts." (Rec., 81, 82.) The map hereinafter shown and appearing in the record was further fully verified at the trial by the testimony of witnesses testifying to the physical representations upon the map and its accuracy as to detail, including the location of the meander line.

The record states: "In connection with the offer of "said plat defendant called witnesses, who testified that "said plat was made from actual survey, measurements "and levels." * * * "That upon said plat the "figures in red ink gave the elevations above or below "*datum*, those below *datum* being preceded by a minus "sign." And that "the plat was drawn to show sub-"stantially all of the territory involved, the open space "surrounded by shaded lines extending north-eastwardly "through the east half of section thirty, etc., and the like "space in section twenty-nine, etc., being designed to "represent water, the westerly portion being that known "as Hyde Lake, the easterly portion being known as "Wolf Lake." (Rec., 61.)

The record also shows that proof was made that, "at "the time of said survey by said Wolcott, in 1874, said "Wolcott found all of the witness trees called for in the "field notes of the government surveyor of the original "survey." (Rec., 62.)

The map, thus verified by witnesses and the special findings of the court, is as follows:

In some of the briefs this map will be disconnected for more convenient use by the court. (Original Record, 80.)

To distinguish the plaintiff's original tracts on sections 19 and 30, deraigned through the Holbrook patent, the contour lines and the acreage estimated by the government are brought out in the above map with heavier lines. The fraction in the north-east quarter, section 30, contained only 28.74 acres, the fraction in the south-east of 19 contained 79.11 acres, and that in the south-east quarter 30, 2.04 acres.

It will be observed upon an inspection of map marked "Defts'. Ex. 4," that between the meander line constituting the western boundary of the 2.04 acre tract, described as "the east fraction of the south-east fractional quarter "of fractional section 30," and the permanent water of Hyde lake—a tract claimed as riparian to the 2.04 acre fraction of the plaintiff—that the elevations of the land which the circuit judge found in his special findings to be the same now as in 1835, when the Clark survey was made, are as follows: a little north of the north end of the apex of the triangular tract 4.5 feet; a little northwest 2.5; about one-third the distance from apex to base, going west 2.3; 2.4; 2.4; 2.4; 2.4 and 3 feet, the latter elevation being 91 rods west of the west line of plaintiff's tract; that, about one-third of the distance north from the base of the triangle going west as before, they are 2.3; 2.3; 2.3; 2.3, for a distance of probably sixty rods from west line of plaintiff's tract; and, that immediately south of the south end of permanent water they are 2.8 and 2.9 feet. (Defts'. Ex. 4.)

The circuit judge in his special findings found, "that "the level of the water in said lake or lakes when the

" same reaches *the level existing at the time of the govern-*
" *ment survey of 1834 and 1835* is 2.2 feet above datum."
(Record Special Finding 7; page 59.)

And, further found " that the plaintiff was bounded by " the meander line run by the surveyor."

It will thus be seen that the lands covered by these elevations—the tract claimed by the plaintiff as riparian right attached to her 2.04 acre tract, and constituting probably about forty acres of land—*was uncovered and not under water when the government survey was made in 1834–5.*

The special finding of the circuit judge, as to this same area (latter part of special finding 4, Rec., 58), is that " the physical condition west of the meander of said east " fraction, etc., is the same for a distance of ninety-one or " more rods westerly as it is generally at and along said " meander line, the same character of growth as aforesaid " appearing in the water at ordinary and high stages for " said distance west of said line, the greater part of plaint- " iff's said land in said east fraction of the south-east frac- " tional quarter of said section 30, being *wet and unfit for* " *cultivation*, and only slightly higher than that to the " west, there being 2.04 acres in said east fraction, treat- " ing the meander line as the boundary, in the form of a " right angle triangle, with its base resting on the south " section line, with the meander line as a western bound- " ary thereof.

" The point at which to the south the open water of " said lake ceases, and marsh grass begins, is several rods " north of the south line of said section 30.

" *The physical condition of the land and water are sub-* " *stantially what they were at the time of the original sur-* " *vey.*" (Rec., 58.)

Turning attention to the meander line across the south-east ¼, section 19, it will be observed that the elevation of the ground over which the meander line was run, commencing at the east and west quarter line on said quarter, is as follows: 2.4, 2.8, 4, 3, 3.4, 8, 7, 7, 7.5, 8.3, 8.4, 3, 2.8, 8.1, 2.3, etc., while just west of the meander line the elevations are greater still. Observe also in the north-east part of said quarter an elevation of 3.2 feet, at least sixty rods east of the meander line and south of the quarter line, and east of the meander toward the open water, many elevations above 2.2 feet, the elevation of the water when the original survey was made.

Again, turning attention to the bed of Hyde lake, at the section line between sections 19 and 30, and 20 and 29, and it will be observed, that there is but *one* point in the bed of the lake as low as *one foot* below datum, the next deepest being three-tenths of a foot, while all of the other elevations are *above* datum.

Proceeding south, observe an island, the south part of which is 1.9 feet above datum, while the bed is below datum only at three points—.1, .2 and .3 of a foot—the rest of the elevations being .3 of a foot above datum.

The elevations above given having been taken upon a right line are manifestly selected without reference to greatest or least elevations of the bed of the lake.

It is noticeable that the bed of the lake on the east side is noted as "sand."

The court will find, at page 8 of our argument in the case of *Mitchell, Plff. in error* v. *Jordan et al., Defts. in error*, No. 167, on the present docket of this court, another map covering the same territory at a lower stage of water, reduced to the size of the brief page.

It thus appears in the record that Hyde lake is and in 1834 and 5 was a shallow sheet of water entirely surrounded by water-sheds of more or less height, and that its source of water supply was manifestly from rainfall, springs, melting ice and snow, and not from any direct connection with any navigable body of water. The "outlet" so called, was only such when the basin of the lake was filled up to the point of overflow of the water-shed at that point. Thus Hyde lake was and is entirely separated from Wolf lake, at all times except in times of extraordinary high water, and is nothing more than a shallow pond. *From the special findings of the court this was substantially its condition also at the time of survey in 1834 and 5.*

February 12, 1878, the commissioner of the general land office, in deciding the appeal taken by Hardin, DeWitt and others, said, among other things: "On the 9th of January, "1875, copy of the plat of this survey was sent to the "district officers at Springfield, with instructions to notify "all claimants for the lands of a day set for hearing testi- "mony regarding such claims, and after such hearing to "transmit all the proceedings, with their joint opinion "thereon, to this office.

"Pursuant to such instructions, hearing was held on "February 8, 1875, and succeeding days. * * * On "transmitting the claims and testimony, the district offi- "cers at Springfield *forwarded their joint opinion thereon "adverse to * * * the riparian claimants*, * * * "and in favor of certain of the pre-emption and home- "stead claimants." Among these, as the opinion shows, were the pre-emption claims of Farrand, Rushmore, Cleaveland, Condit and Field, from whom, the court finds, Jordan deraigned title.

"The riparian claims of Gertrude Hardin and Horatio "B. DeWitt have been denied by the action of this office "in ordering and approving the survey of the lake bed, "thus treating the land as belonging to the United "States." (Rec., 79, 80 and 83.)

From this decision DeWitt and Hardin prayed an appeal to Hon. Carl Schurz, Secretary of the Interior, who, in deciding the appeal, said, among other things: "An "application, dated August 19, 1874, based upon affida- "vits, was made to your (Com. Gen. Land Office) office "for a survey, under circular of July 1st, 1874. (Copp's L. "L. P., 765.) Upon this application a survey was "ordered, which was duly executed and approved by "your predecessor, December 31, 1874, a copy of the "plat of which was soon after filed in the local office at "Springfield.

"Since the approval, the tracts thus surveyed have "been recognized and treated as public land, and claims "have been initiated thereto in the usual manner, under "general laws. * * * The tracts surveyed in 1834 "and '5 were disposed of long prior to the survey of "1874, and owners of tracts that abutted upon the "meanders of the lake, under the old survey, now claim "the newly surveyed tracts as riparian owners.

"The parties thus claiming are Horatio B. DeWitt and "Gertrude Hardin, both of whom have appealed. You "rejected their claims upon the ground that they 'have "been denied by the action of your office in ordering "and approving the survey of the lake-bed, thus treating "the land as belonging to the United States.' It seems "to me that no other decision can consistently be reached. "To recognize riparian rights to these tracts would be "equivalent to saying that the lands did not belong to the

"United States, and that the survey is a nullity. It is now "too late for this department to question the legality of the "survey. It is an accomplished fact. It was ordered, be- "gun and fully executed under a former administration. "Parties claiming the land under the laws of the United "States have proceeded with regard to their claims, rely- "ing upon its regularity and legality, and they should be "heard by this department and have their claims disposed "of as in other similar cases of claims to public land. "Your predecessor decided to order the survey upon con- "sideration of the application therefor, and it was ordered "*in pursuance of the regular practice of your office and of* "*circular instructions for all surveys of that class of land.* "The ordering of the survey, as well as the approval "thereof, involved a decision that the land belonged to "the United States.

"There is nothing to show that the order of approval "was procured by fraud, or that either was the result of "inadvertence or mistake. As no grounds are presented "for setting aside the action of your predecessor, or to "show that the lands were not subject to public survey in "accordance with the rulings and practice of your office "for a long series of years, the survey will not be dis- "turbed, but will remain intact. Your decision rejecting "the riparian claims of DeWitt and Hardin is therefore "affirmed." (Rec., 92 and 93.)

Three several applications for a rehearing were successively made by Hardin, and denied. The first was decided by the acting Secretary of the Interior, August 24, 1880, wherein it is, among other things, said the petition for rehearing was simply a reargument of the original case, and that it presented "no new or additional reasons "why the action of your predecessor in ordering and ap-

"proving the survey of 1874 should be now disturbed. "The decision held in effect that the matter of ordering "and approving of said survey was *res judicata*, and that "no case had been made out under the well established "rule to justify the present head of the department in re-"opening or setting aside the action of your predecessor "in the premises." * * * "I find from the records "of your office that Mrs. Hardin *had knowledge of the "fact that the survey was being made, and due notice of "the approval thereof, and of the filing of the plat in the "local office at Springfield, and took no appeal.*

"Considerable correspondence was had between Mr. I. "N. Hardin, who appears as attorney in fact for Gertrude "H. Hardin, and your office pending the survey. * * * "On the 28th of November, 1874, he was advised that "the survey had been approved. On the 30th of Sep-"tember, 1874, he addressed a letter to your office, which "the following reply thereto, under date of *Jannary 7, 1875*, "addressed to Mr. Hardin, at 238 South Water street, ex-"plains: 'I am in receipt of your letter of the 30th ult., "requesting to be informed what effect the approval of "the survey of Wolf lake has upon the subject of your "former communications, namely, the question raised "by you as to the navigability of the waters of said lake. "You also, enquire whether this office regards the lands "from which the waters have receded as public lands.

"In reply I have to inform you that conclusive evi-"dence having been filed in this office, showing the non-"navigability of the waters of the bed of said lake, and "the survey having been made and approved, the plat "thereof, together with instructions to the register and "receiver, has this day been forwarded to the local land "office at Springfield, Illinois. The lands are regarded as "public lands.'" (Rec., 96 and 97.)

The second application for a rehearing was denied in an opinion filed May 16, 1880. In this decision the Secretary of the Interior says: "The application under consideration presents nothing new and material to the department, all the material matters alleged having been fully considered by my predecessor on the appeal from your decision of February 12, 1878, and in the decision rendered by him August 24, 1880, rejecting an application of Gertrude Hardin for a rehearing of the case." * * * "In the decision of August 24, 1880, above referred to, my predecessor considered this point and showed that Mrs. Hardin *had notice of the survey of 1874, and an opportunity to make such objections thereto as she might be advised were proper and could have appealed from the approval of said survey.*

"The approval of that survey was necessarily made upon a final decision by the commissioner of the whole matter then before him. The approval was the result and expression of that decision. That decision affected the claimed rights of Gertrude Hardin, and *from it she should have appealed.* The right of appeal was not exercised, and her rights were concluded, so far as this department is concerned. The right of appeal has now expired and no appeal can be allowed. As to the statement that the act of the commissioner in approving said survey was illegal and is admitted to be so, I have to say that I know of no decision of your office or this department in which such admission was made. On this point my predecessor, in the decision of May 4, 1880, said: 'You reject their claims (Hardin's and DeWitt's) on the ground that they have been denied by the action of your office in ordering and approving the survey of the lake-bed, thus treating the land as belonging to the United

"States." * * * "No further reply to the allega-
"tion that the survey of 1874 is admittedly illegal is
"necessary.'" (Rec., 98, 99 and 100.)

From the decision of Secretary Schurz affirming that of the Commissioner of the General Land Office, no appeal was ever taken.

Upon a third application of Hardin, Secretary Kirkwood in denying the application in an opinion filed April 28, 1881, said: "I find that on the 4th of May last my "immediate predecessor, in an elaborate discussion of the "question at issue in this case, affirmed the action of the "commissioner of the general land office in rejecting the "riparian claims of DeWitt and Hardin.

"On the 24th of August last, he overruled an applica-
"tion of Mrs. Hardin for a rehearing in the case.

"I am concluded by his action in the matter." * * *
"It is not pretended in this case that any new evidence
"has been discovered and I cannot but regard the matter
"as *res judicata*, which I am not at liberty to disturb."
(Record, 101 and 102)

This statement is necessary because of the course pursued by counsel for the plaintiff in his argument.

The jury was waived in the trial court and the case heard by the judge, whose findings of fact are conclusive in this court, and on which questions of law arising can only be considered here. Yet counsel for plaintiff has proceeded to argue as if the plat based on the survey of 1834 was correct, as if there was a large body of water which is marked "navigable lake," in existence in 1834, and when Holbrook entered the land, when in fact, as found by the court, there was not, but on the contrary a large body of dry land, which has continued to this day.

There is not so much difference with counsel as to his law, as to his facts. His citation of authorities may apply to his supposed case, but certainly do not to the case, etc.

On page 6 of plaintiff's brief will be found in italics—the language—"*showing how far it juts into the water.*"

Judge Gresham's fourth special finding (Rec., 57) warrants no such language. The context preceding clearly implies a continuous ridge or body of land running from the north-easterly to the south-westerly clear down to plaintiff's 2.04 acre fraction, being said east fraction of the south-east of 30.

It is admitted in the brief (p. 34), that Judge Gresham's special findings followed Defendant's Exhibit 4 heretofore shown in this brief.

On page 26 of plaintiff's brief, it is said (referring to Wolcott's survey and retracing of the meander line), "such retracing does not appear to have been made by "the survey of 1874, which was only an extension of "lines through the lake."

In plaintiff's bill of exceptions (Rec., 62) it is said: "There was also testimony introduced tending to show "that at the time of said survey by said Wolcott, in 1874, "said Wolcott *found all of the witness trees called for in "the field notes of the government surveyor of the original "survey*," etc.

An inspection of the plat of the Wolcott survey (Rec., between pages 60 and 61), the court will see that the outer line represents the meander line. It is manifestly shown on that plat as the boundary of the fractional tracts.

So it is sufficiently shown in this record, that the meander line run by Clark in 1834 and 1835 was actual-

ly retraced, the monuments and witness trees found, and that the lines of the Wolcott survey in 1874 *were actually run and measured.*

There is nothing in the record to negative the presumption which the law requires, that Wolcott did his duty in these regards and otherwise.

If the court will turn to page 29 of plaintiff's brief, it will be observed that the east half of the map or plat there shown is entirely ideal. It purports to be a showing "of a part of the township next east in Indiana" * * * "with Lake Michigan and Lake George."

There is no evidence in this record to justify such a map as this.

There are some findings in respect to Wolf river; but it is not located, and the court finds, that it "*was and* "*has continued to be subject to interruption by the forma-* "*tion of a sand-bar across the mouth thereof upon the* "*shore of Lake Michigan.*" (Rec., 58.)

In this ideal map, Wolf river, instead of being shown as land-locked at its mouth, appears to be wide—*very wide*—and flowing into Lake Michigan.

The large body of land running continuously from north-easterly to south-westerly across sections 20 and 29, and the map (Def'ts. Ex. 4) showing it—and upon which as counsel say, the court made findings—are entirely ignored. The outlet across section 30 to the Calumet river is very, *very* much enlarged.

The court will see by Defendants' Exhibit 5 (Rec., bet. pp. 60 and 61), that this outlet from Hyde lake to the Calumet river is more than four miles *up the river* from Lake Michigan.

The showing of Lake George and its alleged connection with Wolf lake is not supported by any evidence in the record, and this whole map, so far as not supported by the evidence, can have no other purpose than to mislead the court.

Again, if the court will look at map between pages 34 and 35 of plaintiff' sbrief, there will be found what is termed an "outline," also manifestly tending to mislead, purporting to show the body of land between Wolf and Hyde lakes according to Judge Gresham's findings.

If the court will place Defendant's Exhibit 4—in accord with which, in a large measure, it is conceded and complained that Judge Gresham made his special findings—it will be perceived how fitly this map is named an "out-" line."

It does not purport to show the elevation of water.

The same ideal artist has again tried his hand on two other ideal pictures. They will be found between pages 46 and 47 of plaintiff's brief, Nos. 5 and 6 respectively, and even more appropriately than No. 4, are also called "outlines."

These pictures were drawn when the artist was manifestly in a trance—imagining how it would appear with the elevation of water at three and five feet respectively.

These four "outlines" together—Nos. 3, 4, 5 and 6 of plaintiff's brief—are well calculated to mislead.

"Outline" 3 shows open connection with Lake Michigan by Wolf river and no sand-bar. "Outline" 4, plaintiff's version of Defendant's Exhibit 4, and Judge Gresham's findings, and "outlines" 5 and 6 imaginary appearances at times when water is three and five feet above datum.

There is *no proof* that water has ever been three and five feet above datum in these lakes.

The record shows these lakes substantially land-locked and little subject to the rise and fall of Lake Michigan—the mouth of Wolf river being almost constantly closed by sand-bar, a large body of land entirely separating Hyde from Wolf lake and the outlet from Hyde lake to Calumet river being *four to four and one-half miles up Calumet river from Lake Michigan, up to the river.*

The extreme rise and fall of water in Lake Michigan, a lake more than two hundred miles long, and nearly one hundred miles across, is manifestly temporary, and caused by long continued north and south winds piling up the waters on the south and north shores, and not so much from rain-fall within its water-sheds and like causes.

This manifestly does not affect Hyde lake to any considerable degree. There is no evidence that these extreme rises and falls of Lake Michigan affect Hyde and Wolf lakes to any such degree as to justify the sketches, or "outlines" 5 and 6.

Points and Authorities.

I.

The mere fact that a meander line is designated upon the government plat, as a meander line cannot be conclusive in the matter.

The patents issued under the survey of 1874, under which Jordan held, were lands omitted in the survey of 1835, the title to which remained in the government of the United States.

A. The reasons assigned by the Commissioner of the General Land office in ordering the survey of 1874, are immaterial.

The title to the lands described in the declaration is in issue, and not the right or propriety of making the survey.

B. The government is not estopped or bound by the statements, acts or representations of its agents, where they are not in accordance with the truth, and the truth may always be shown.

Lammers v. *Nissen*, 4 Neb., 245.
Alexander v. *Georgia*, 56 Ga., 486.
People v. *Brown et al.*, 67 Ill., 438.
Taylor v. *Shafford*, 4 Haker, 132.
Chandler v. *Landford*, 4 Dev. & Batl., 408.
Wallace v. *Maxwell*, 10 Riddell, 212.
Farish v. *Corn*, 40 Cal., 50.
Crane v. *Reeder*, 25 Mich., 320.

United States v. *Insley et al.*, 9 Sup. Ct. Reporter, 485 and 486, and cases there cited; also reported in 130 U. S., 266.

The exception to the rule, viz.: where the act is done in the sovereign capacity of the state, as by a legislative enactment or resolution, does not cover this case.

Alexander v. *Georgia*, 56 Ga., 486.
State of Indiana v. *Milk*, 11 Fed. R., 389.

C. Where meander lines are run by government surveyors surveying government land so as to leave between such lines and the banks or bodies of water which are purported to be meandered considerable bodies of land, which are above the ordinary stage of such water, and covered with vegetation or timber, the patents for the surveyed land are limited by the meander line, and the patentees are not riparian proprietors.

Granger v. *Swart*, 1st Wolworth, 90.
Lammers v. *Nissen*, 4 Neb., 245.
Glenn v. *Jeffrey*, 75 Iowa, 20.
Bissell v. *Fletcher*, 19 Neb., 726.
Bissell v. *Fletcher*, 43 N. W. R., 350.

The official act of the officers of the Land Department will be presumed to have been lawfully performed.

Bank v. *Dandridge*, 12 Wheat., 70.
Coombs v. *Lane*, 4 Ohio St., 112.
Ward v. *Barrows*, 2 Ohio St., 241.
Tecumseh Town Site case, 3 Neb., 284.

D. The general principles of the law of riparian rights, where they exist, are not controverted in this case.

The contention here is that they do not exist.

3 Kent Com., 427.

Deidrich v. *The N. W. R. R. Co.*, 42 Wis., 262.
R. R. v. *Schurmier*, 7 Wall., 272.
Braxton et al. v. *Bressner*, 64 Ill., 488.

E. It is the law in Illinois, as established by the Supreme court of that state, that *where land is conveyed or granted along or upon a natural non-navigable lake or pond, the conveyance or grant extends only to the water's edge.*

Trustees of Schools v. *Schroll et al.*, 120 Ill., 519.

This court will adopt the rule determined by the Supreme court of Illinois, in respect to riparian rights of individual contestants upon non-navigable waters within that state.

Barney v. *Keokuk*, 94 U. S., 228.

Those bodies of water are non-navigable which are not navigable *in fact*.

Gould on Waters, Sec. 43 and note, and authorities cited; and Sec. 54 and note, and Sec. 72.
McManus v. *Carmichael*, 3 Iowa, 1.
Colchester v. *Brooke*, 7 Q. B., 339.
Mayor v. *Lynn*, 1 Cooper, 86.
Miles v. *Rose*, 5 Taunt., 706.
Rex v. *Montagu*, 4 B. C., 598.
The Monticello, 20 Wall., 439.
The Daniel Bell, 10 Wall., 557.

To be navigable the waters must form, by themselves or their connections with other waters, a continuous highway over which commerce is or may be carried on.

Rowe v. *Granite Bridge Co.*, 21 Pick., 344.

Charleston v. *County Commissioner*, 3 Met., 202.
Attorney General v. *Woode*, 188 Mass., 436.
United States v. *New Bedford Bridge*, 1 Wood & M., 401.
Weathersfield v. *Humphy*, 20 Conn., 218.
Grotin v. *Hurlburt*, 22 Conn., 178.
Burrows v. *Gallup*, 32 Conn., 501.
Brown v. *Preston*, 38 Conn., 219.
Glover v. *Powell*, 10 N. J. Eq., 211.
Flannagan v. *Phil.*, 42 Penn., St., 219.

F. Hyde lake being non-navigable, its bed did not pass to the State of Illinois as the trustee for the public and conservator of the right of public navigation, and the survey and patent of the lands involved in this case is in accord with its uniform practice.

Rogers v. *Jones*, 1 Wend., 255.
Canal Comr. v. *The People*, 5 Wend., 448.
Smith v. *Miller*, 5 Mason (U. S. C. C.), 191.
Coovert v. *O'Connor*, 8 Watts, 470.
Angell on Water Courses, Sec. 6.
Ledyard v. *TenEyck*, 36 Barb., 102.

An easement in non-navigable waters cannot exist, except by grant or prescription.

Cook v. *Stevens*, 11 Mass., 533.
Stevens v. *Stevens*, 11 Met., 255.
Gould on Waters, Sec. 300, note 3.

G. The principle established by the Supreme court of Illinois in the case of *Trustees of Schools* v. *Schroll et al*,, 120 Ill., 519, that the owners of lands bordering on ponds

and non-navigable lakes are limited to the water's edge, is fully sustained by the most trustworthy and reliable line of authorities.

Wheeler v. *Spinola*, 54 N. Y., 385.
Canal Comr. v. *The People*, 5 Wend., 446.
Champlain & St. L. R. R. Co. v. *Valentine*, 19 Barb., 490.
Kingman v. *Sparrow*, 12 Barb., 206.
Waterman v. *Johnson*, 13 Pick., 265.
Roxbury v. *Stoddard et al.*, 7 Allen, 167.
Paine v. *Woods*, 108 Mass., 170.
Hittinger v. *Eames*, 121 Mass., 546.
Prinner et al. v. *Walker*, 38 Mo., 99.
Bradley v. *Rice*, 13 Mo., 201.
Nelson v. *Butterfield*, 21 Mo., 229.
Wood v. *Kelley*, 30 Mo., 53.
Robinson v. *White*, 42 Mo., 218.
Manson v. *Blake*, 62 Mo., 41.
State v. *Gilmanton*, 9 N. H., 463.
Fletcher v. *Philips*, 28 Vt., 268.
Austin et al. v. *Rutland R. R. Co. et al.*, 45 Vt., 242.
Mariner v. *Schulte*, 13 Wis., 698.
Indiana v. *Milk*, 11 Fed. Rep., 395.

H. *Whether the mathematical lines run by the surveyor in 1835, and established by monuments at the intersection of section lines, or the water's edge was the real boundary of the lands involved in this suit, the title acquired by the patentees of the fractions was limited to the boundary line, and no riparian rights are involved.*

The title to the soil under the water is entirely independent of that to the bank.

Diedrich v. *The N. W. Ry. Co.*, 42 Minn., 262.

II.

HARDIN AND DEWITT HAVING BEEN NOTIFIED, AND HAVING APPEARED BEFORE THE REGISTER AND RECEIVER OF THE LOCAL LAND OFFICE; HAVING APPEALED FROM THEIR DECISION TO THE COMMISSIONER OF THE GENERAL LAND OFFICE, AND AGAIN APPEALED FROM HIS DECISION TO THE SECRETARY OF THE INTERIOR AND HAVING CONTESTED IN THE LAND DEPARTMENT BEFORE THESE OFFICERS OF THE GOVERNMENT, THE QUESTION WHETHER OR NOT THE LAND EMBRACED IN THE SURVEY OF 1874 BELONGED TO THE GOVERNMENT; THE DECISION OF THE SECRETARY OF THE INTERIOR HAVING BEEN ADVERSE TO THEM; AND THE QUESTION HAVING BEEN DECIDED UPON EVIDENCE ADDUCED BEARING UPON THE QUESTION AS A FACT, THEY AND THEIR GRANTORS ARE ESTOPPED BY THE DECISION OF THE SECRETARY OF THE INTERIOR FROM AGAIN CONTESTING THE QUESTION IN THE COURTS.

Johnson v. *Towsley*, 19 Wall., 83.
Warren v. *Van Brunt*, 19 Wall., 653.
Shepley et al. v. *Cowan et al.*, 91 U. S., 340.
Moore v. *Robins*, 96 U. S., 530.
Marquiz v. *Frisbie*, 101 U. S., 473.
Vance v. *Van Brunt*, 101 U. S., 519.
United States v. *Schinz*, 102 U. S., 401.
Smelting Co. v. *Kemp*, 104 U. S., 646.
Steele v. *Smelting Co.*, 106 U. S., 447.
Quinn v. *Conlon*, 104 U. S., 421.
Baldwin v. *Stark*, 107 U. S., 465.
Cowell v. *Lammers*, 21 Fed. R., 200.

Wright v. *Dubois*, 21 Fed. R., 649.
Aurora Hill Con. Min. Co. v. *85 Min. Co. et al*, 34 Fed. Rep., 515.
Terry v. *Steele*, 18 Legal News, 2.
Cragin v. *Powell*, 128 U. S., 693.

Also

Haydil v. *Dufresne*, 17 How., 25.
Steele v. *St. L. Smelting & Min. Co.*, 106 U. S., 447.
Pollard v. *Dwight*, 4 Cranch, 429.
West v. *Cochran*, 17 How., 403.
Stanford v. *Taylor*, 18 How., 409.
Gazzam v. *Phillips*, 20 How., 372.
U. S. v. *San Jacinto Tin Co.*, 125 U. S., 273.
Fisher v. *O'Connor*, 115 U. S., 122.

III.

AS TO THE ASSIGNMENT OF ERRORS.

A. The first three, and fourth and fifth assignments may be severally grouped and treated together, and are answered by previous positions.

Plaintiff in error cannot complain of an error committed in her favor.

Had plaintiff been entitled to claim riparian rights—as she was not—the judgment of the court giving her to low-water mark on the south-east of 19, 37, 15, would have been the correct rule.

Gould on Waters, Secs. 198 and 203.
Canal Comr. v. *People*, 5 Wend., 423.
Wheeler v. *Spinola*, 54 N. Y., 377.
Waterman v. *Johnson*, 13 Picd., 261.

West Roxbury v. *Stoddard*, 7 Allen, 158, 167.
Paine v. *Wood*, 108 Mass., 170.
Wood v. *Kelley*, 30 Maine, 47.
Fletcher v. *Phillips*, 28 Vt., 257.
Jackeway v. *Barrett*, 38 Vt., 316.
Mariner v. *Schulte*, 13 Wis., 792.

The declaration would not have supported a larger judgment.

The judgment was right as to the fraction on south-east 30, 37, 15.

B. The fourth and fifth assignments are without merit.

Granger v. *Swart*, 1 Wol., 90.
Lammers v. *Nissen*, 4 Neb., 245.
Glenn v. *Jeffrey*, 75 Iowa, 20.
Bissell v. *Fletcher*, 19 Neb., 626.

ARGUMENT

I.

May it please your Honors, I contend in the first place:

THAT THE LANDS INVOLVED IN THIS SUIT ON SECTIONS 19, 20, 29 AND 30, TO WHICH PATENTS WERE ISSUED UNDER THE SURVEY OF 1874, WERE LANDS OMITTED IN THE SURVEY OF 1835, THE TITLE TO WHICH REMAINED IN THE GOVERNMENT OF THE UNITED STATES UNTIL CERTIFICATES OF PURCHASE WERE ISSUED TO THE PATENTEES UNDER THE JUNIOR SURVEY, AND THAT THEY SEVERALLY BECAME VESTED BY THEIR SEVERAL CERTIFICATES OF PURCHASE AND SUBSEQUENT PATENTS WITH AN ABSOLUTE TITLE IN FEE SIMPLE TO THESE LANDS.

A. The proof, in this case, is conclusive that the surveyor representing the government in making the survey of 1835, either intentionally or negligently omitted these lands, and knowingly or carelessly represented them as navigable water on the plat of the survey, which he reported to the government, and under which survey these several fractional tracts on 20, 29, 19 and 30 were subsequently patented.

It is not to be questioned that, at the time of the survey in 1835, there was a continuous body of land running in a south-westerly and north-easterly direction from the meander line run in that survey as the south line of said fractional south-west quarter of section 20, and the meander line run in the same survey as the north-easterly boundary of said fractional section 29.

The findings in this record approach mathematical certainty, that when the surveyor made his survey, in 1835, he either impelled by his personal interest in his contract with the government, or by negligence and inattention, clearly mistook the line, which he should have properly meandered. He ignored the existence of this large body of land and treated it as navigable water, whereas, it must have been manifest that it was land, and must have been clear, also, that Hyde lake, now so called, was a mere pond and marsh of very shallow water.

It is probable that at the time of this survey, from rainfall or melting ice and snow, the water was in an abnormal state, but as we have seen, the court has fixed the state of the water at that time to have been 2.2 feet above datum, and hence, to have represented this land as navigable water was a false return on the part of the Deputy Surveyor Clark and a fraud upon the government. He clearly should have run his meander line along the west shore of what is now Wolf lake; and approximately upon the half section north and south line of sections 20 and 29, instead of on the west side of the marsh, which then as now existed west of what is now called Hyde lake. This whole region was, probably, regarded at that time as of little value.

In making this mistake, however, the act of the surveyor in running this meander line and making a false return of it was not binding upon the government. Its rights and the rights of others were not affected by the representation in his Field notes, and upon the plat of his survey made in the Department and based upon them, that the meander line was run along the shore of a "navigable lake," nor that this large tract of land was navigable water.

The fact that the commissioner of the general land office, in ordering a survey in 1874, proceded upon the theory that the title to the bed of a lake which had become dry, although erroneous, does not change the rights of the parties. If land which should have been surveyed in 1834, was omitted, it was lawful to make the survey in 1874, and the reasons assigned by the Commissioner are immaterial.

The title to the land described in the declaration is in issue, and not the right or propriety of making a survey in 1874.

B. IT IS A FUNDAMENTAL PRINCIPLE THAT THE GOVERNMENT IS NOT ESTOPPED OR BOUND BY THE STATEMENTS, ACTS OR REPRESENTATIONS OF ITS AGENTS WHEN THEY ARE NOT IN ACCORDANCE WITH THE TRUTH, AND THAT, NOTWITHSTANDING, THE TRUTH MAY ALWAYS BE SHOWN.

Lammers v. *Nissen*, 4 Neb., 245.
Taylor v. *Shufford*, 4 Hakes, 132.
Chandler v. *Lansford et al.*, 4 Dev. & Battle, 408.
Wallace v. *Maxwell*, 10 Riddell, 212.
Farish v. *Coon*, 40 Cal., 50.
Crane v. *Reeder*, 25 Mich., 320.
Alexander v. *Georgia*, 56 Ga., 486.
People v. *Brown et al.*, 67th Ill., 438.
United States v. *Insley et al.*, 9th Sup. Ct. Reporter, 485–6., and cases there cited; also, 130 U. S., 266.

The exception to the rule, which does not cover the prosent case, is where the act is done in the sovereign

capacity of the state, as by a legislative enactment or resolution.

Alexander v. *Georgia*, 56 Ga., 486.
State of Indiana v. *Milk*, 11 Fed. R., 389.

In *Lammers* v. *Nissen*, *ante*, the court say: "The mere "fact that it is run and is designated upon the plats as a "meander line, certainly cannot be conclusive in the mat- "ter. To establish the doctrine that such meander line is "conclusive would estop the government from disposing of "lands unsurveyed between such line and the bank of the "stream. It would prevent the correction of mistakes "made by surveyors in such case and would be in direct "conflict with the well settled rule of law defining what is "an accretion to land."

In the case of *Taylor* v. *Shufford*, 4 Hakes, 132, the court say: "I know of no case where the sovereign "power has been estopped; the cases are all the other "way, and policy and justice require that they shall be "so. This sovereign, or sovereign power, is a trustee "for the people; it acts by agents; the people should not "be bound by any statement of facts made by those "agents for their benefit, the truth may always be shown, "notwithstanding any former statement to the contrary."

In *Chandler* v. *Lansford*, Chief Justice Ruffin, refering to the above case, says: "The sovereign cannot be "estopped, as a rule of justice and policy, equally appli- "cable to our institutions and to those of the mother "country. The state was, therefore, at liberty to aver, "that at the time the patent to the lessor of the plaintiff "emanated, the land had been granted to Blount; and, "so may, consequently, the defendant."

In *Wallace* v. *Maxwell*, 10 Riddell, 112, the court say:

"The sovereign cannot be estopped. It acts by agents "and is the trustee of the people, and for their benefit "the truth may always be shown."

In *Farish* v. *Coon*, 40 Cal., 50, the court say: "Nor "is the state estopped from asserting title to these lands "by the fact that the purchase money for the warrants "was paid into the state treasury and has never been re- "funded or offered to be refunded. When the pur- "chasers of the first purchased the warrants, they knew, "or were bound in law to know, they could only be lo- "cated on lands belonging to the United States. They "were sold to them by the state for that express pur- "pose and no other, and there was no covenant, express "or implied, that, if through mistake, the warrants should "be located on other lands, not subject to location, the "state should refund the money." * * * "Estoppels "are maintained on precisely the opposite theory. The "state is under no obligations, legal or moral, either to "return the purchase money for the warrants, or to re- "frain from claiming the land." * * * "Equitable "estoppels are founded solely on the theory that to per- "mit a party to maintain the right which he asserts "would operate as a legal fraud upon his adversary."

In *Crane* v. *Reeder*, Judge COOLEY, delivering the opinion of the court, says: "The doctrine that the state "would waive its rights to its lands or estop itself from "claiming them by taxing them to an occupier and tak- "ing proceeding to enforce payment of the taxes, would "be rather startling to the officers having charge of the "public domain and would indicate an easy mode in which "trespassers would convert their trespass into a complete "ownership."

In *Alexander* v. *The State of Georgia*, the court say: "As

"a question of law the state is not bound or estopped "from asserting her rights to her own property, unless "it is done in her sovereign capacity by a legislative en- "actment or resolution."

Justice BREESE, in delivering the opinion of the court, "in *The People* v. *Brown et al.*, 67th Ill., 438, *ante* said: "It is a familiar doctrine that the state is not embraced "within the Statute of Limitations unless specially "named; and, by analogy, would not fall within the doc- "trine of estoppel. Its rights, revenues and property "would be at a fearful hazard should this doctrine be "applicable to a state. A great and over-shadowing pub- "policy of preserving their rights, revenues and property "from injury and loss by the negligence of public officers "forbids the application of the doctrine. If it can be ap- "plied in this case, where a comparatively small amount "is involved, it must be applied where millions are in- "volved, thus threatening the very existence of the "government."

In the case of *The United States* v. *Insley et al.*, 9th Sup. Ct. Reporter, 485, the court repeating the language used in a former case say: "It is settled beyond doubt "or controversy—upon the foundation of a great princi- "ple of public policy, applicable to all governments alike, "which forbids that the public interest shall be prejudiced "by the negligence of the officers, or agents, into whose "care they are confided—that the United States has certain "rights invested in them as a sovereign government, are "not bound by any statute of limitations, unless Congress "has clearly manifested its intention that they should be "so bound."

Citing

Lindsey v. *Miller*, 6th Pet., 666.

United States v. *Knight*, 14 Pet., 301.
United States v. *Thompson*, 98 U. S., 486.
Fink v. *O'Neil*, 106 U. S., 272.

And also, quoting the language of the case of the *United States* v. *Beebe*, say:

"The principle that the United States are not bound "by any statute of limitations, nor barred by any laches "of their officers, however gross, in a suit brought by "them as a sovereign government to enforce a public "right or to assert a public interest is established past all "controversy or doubt."

This doctrine has been illustrated and enforced by the courts in many leading cases, whose authority cannot be disputed, and which are conclusive, as it seems to me, in this case.

Mr. Gould, in his recent work on waters, which is accepted as a standard authority, says, commencing in the last line on page 276:

"IF A MEANDER LINE, RUN BY GOVERNMENT SURVEYORS "IN SURVEYING THE PUBLIC LANDS, LEAVES BETWEEN "SUCH LINE AND THE BANK OF THE STREAM A CON-"SIDERABLE BODY OF LAND WHICH IS ABOVE THE "ORDINARY STAGE OF THE WATER IN THE STREAM, "AND IS COVERED WITH VEGETATION OR TIMBER, THE "PATENT FOR THE SURVEYED LAND IS LIMITED BY THE "MEANDER LINE, AND THE PATENTEE IS NOT A RI-"PARIAN PROPRIETOR."

The author is abundantly supported by a number of cases, whose authority ought not to be controverted, and is not assailed by any known case.

The late Justice Miller, sitting in the Wisconsin circuit

in 1865, upon the trial before a jury of the case of *Granger* v. *Swart*, 1 Wol., 90, laid down a principle announced by Gould in the text above quoted. In instructing the jury he said: "Walker had entered certain lands, "which at one time bounded on Lake Koshkonong and "Rock river. The government surveyor had run a "meander line afterwards, but before the entry, as the "evidence tended to show, a considerable body of land "formed by accretion. This land was low and marshy, "but at certain seasons of the year it became dry, grass "grew upon it, hay was cut, and horses and cattle were "pastured there. Walker conveyed the tract as en-"tered by him to the defendant, who, claiming that "the entry covered this land formed since the survey, "entered into possession, the plaintiff's title was de-"reigned from an entry made subsequent to "the defendant's, which in terms covered the new "land. He having made out a title the defendant sought "to avoid it by showing his prior entry and patent claim-"ing that they covered the premises." * * * "The "patent and deeds under which the defendant claims do "not pass the title to the premises in question, unless, at "the date of the entries under which they issue, the Rock "river, where it is called a river and Lake Koshkonong "where it is called a lake, extended to and bounded upon "the meander line which constitutes the boundary of the "lands described in the patents. In other words, if, be-"tween the meandered line, which by the Government "survey was made one of the boundaries of the land sold "to Walker and the bank of Rock river and the shore of "Lake Koshkonong, there was at that time a body of "swamp or waste lands or flats on which timber and "grass grew and horses and cattle could feed, and hay

"be cut, then the patents to Walker did not cover this "land, but were confined to the actual limit of said mean- "dered line. On the other hand, if when the entries "were made, the bank of the river and shore of the lake, "at an ordinary stage of water were where the meandered "line was represented by the United States survey, and "the land in controversy has since been formed by a re- "ceding of the water or by accretion to the shore and "bank, then it became the land of the defendants or of "Walker, as the title might be in the one or the other. "If the first of these propositions be found by you to be "true the defendant has no title to the land; if the sec- "ond be true he has title to the addition made by the "accretions."

Granger v. *Swart*, 1st Wolworth, 90.

This was an action of ejectment and the verdict of the jury was for the plaintiff, thus finding the title deraigned under the junior survey to these lands between the meander line and waters of the lake and river valid.

This case differs from the one at bar only in this, that the lands involved in this suit, and which are under contention, existed at the time of the survey, and were not formed by accretion after the survey and before Holbrook entered the fractional tracts and received his patent or at any other time. The case at bar is, therefore, a much stronger case than that of *Granger* v. *Swart*.

The case of *Lammers* v. *Nissen*, however, 4 Neb., 245, is precisely like the case at bar. The land in question, in that case, lay upon the west bank of the Missouri river. The original survey was made by one Cook, as goverment surveyor, in November, 1858, who ran a meander line, and represented it upon the map returned

to the Land Department, as running along the bank of the Missouri river, upon which map no reference is made to any land lying outside of the meander; but the Missouri river was represented as coming up to this meander line. The plaintiff entered lot one (1), on the inside of and adjacent to the meander line, in 1861. The evidence in the case showed that at the time of the survey there was from eight hundred to one thousand acres of land between this meander line and the actual bank of the Missouri river, consisting of marshy land; that this tongue of land outside of the meander line was separated from the meander line by a slough, through which the waters of the river would flow; that the meander line was run along the west bank of the slough; that upon portions of the tract cotton-wood and willow trees grew; that this marshy tract or tongue of land was subject to overflow at times of high water. In 1869 the Government caused a survey to be made of this tract lying outside of the meander line, and the survey and plat thereof were approved by the Government, and the defendants subsequently pre-empted and acquired patents under the latter survey. The maps and field-notes of the two surveys were in evidence. It was contended in that case, as in this, that the plaintiff, having acquired title to lot one (1) of the first survey, bounded by a meander line, represented on the plat, approved by the Government as being upon the bank and at the water's edge of the Missouri river—a navigable body of water—the plaintiff took to the actual bank of the river and the water's edge, and that the junior survey and patents, according to the survey, were void. In deciding the case, the Supreme court of Nebraska say (4 Neb., 251): "Another inquiry "involved in the consideration of the case is as to

"what is the effect which a meandered line, purporting "to have been run along a bank of a stream, may "have, in regard to the lands at the time lying be- "tween it and the bank of the stream, and remaining unsurveyed. And in respect to this inquiry I think it sufficient to observe that as to public lands of the United States, conceding the rule to be well settled that a meandered line bordering on the bank of a stream, is not to be considered as the boundary of the tract, but simply as defining the sinuosities of the banks of the stream, and as a means of ascertaning the quantity of the land in the fraction subject to sale, yet the question whether such line does in *fact* define the sinousities of the bank of the "stream or not is one which may be determined by *evi-* "*dence aliunde.* The mere fact that it is run and is designated "upon the plats as a meandered line certainly cannot be "conclusive in the matter. To establish the doctrine "that such meandered line is conclusive, would estop the "government from disposing of lands left unsurveyed be- "tween such line and the bank of the stream; it would "prevent the correction of mistakes made by surveyors "in such case, and would be in direct conflict with the "well settled rule of law defining what is an accretion to "land. In *Granger* v. *Swart*, *supra*, the principle is "enunciated that if between the meander line, by which "the government survey was made, and the bank of the "river, there is, at the time, a body of swamp or waste "lands or flats, on which timber and grass grew, and "horses and cattle fed, then the patents would not cover "this land, but must be confined to the actual limits of the "meander line, and include no more. The title of the "defendants, acquired under the junior survey to the "lands lying between the meander line and the actual "bank of the Missouri river, was, therefore, held good."

In that case, as in this, the surveyor reported to the government and it was represented upon the plat that the meander line run at the west of the marsh, and was along the banks of the Missouri river, a navigable stream; and that the intervening 1,000 acres between the real bank of the river and the meander line, as mistakenly run, was navigable water.

In that case as in this, a portion of land subsequently surveyed was occasionally overflowed by water and the surveyor mistook the real shore of the real body of water, which should have been meandered. There the Supreme court of Nebraska held that neither the federal government, nor its patentees under the junior survey, were to be prejudiced or estopped by the representations upon the government's map, above referred to, but that the junior patentees acquired a good title to the lands surveyed and patented in the later survey, and affirmed the judgment of the court below accordingly.

The Supreme court of Iowa have, also, recently held the same way in another case, which is precisely like the case at bar. The tract involved in the case of *Glenn* v. *Jeffrey*, 75th Iowa, 20, above referred to, was situated on the east side of the same river (Missouri), and the facts were substantially the same as they were in the case of *Lammers* v. *Nissen*, and are in the case at bar. Chief Justice SEEVERS, in delivering the opinion of the court, says that the court instructed the jury as follows: "Under this evidence you are instructed that the plaint-" iff has failed to show title in himself to the land claimed " by the defendant; that the plat and field notes intro-" duced herein show that lot 3 was surveyed and platted " and located upon the north side of certain water, which " was at the time of the survey supposed to be the Mis-

"souri river. It is shown by the Adkins survey, and "other evidence in the case, that lot 3 ran, not to the "Missouri river, but to the waters of a certain bayou, "and that beyond this bayou, and between it and the "Missouri river, was other land, the land claimed by the "defendant. The evidence shows that the land between "this and the river was not surveyed. * * * The "land in controversy is Lot 3 in Sec. 18, Tp., etc., and "the complainant introduced evidence showing title in "himself from the government. The only controversy is "whether the lot, as described, extended to the Missouri "river.

In commenting upon the instruction the court say:

"The evidence warranted the court in giving the instruc-"tion it did. There was no controversy as to the facts. "It is true that the government plat and field notes de-"scribed the meander line as being at the Missouri river, "and therefore, it is claimed that lot 3 extended to the "river. In fact, however, instead of running the meander "line along the river, it was run along the bayou some dis-"tance from the river. The land in question cannot be "regarded as accretion, but existed as it now does when "the survey was made. The court rightly directed the "jury to find for the defendant. The land never was, in "fact, surveyed by the government and never sold or con-"veyed to the plaintiff."

In the case of *Bissell* v. *Fletcher*, 19 Neb., 726, the plat and patent showed lot 3 to contain 52 60-100 acres, and to run north to the Republican river. The defendant claimed lots 6 and 7, which in fact, was land between the river and where the plat showed the bank to be.

The court say: "The contention of the plaintiff is,

" that lot 3 extends to the river; and notwithstanding the " fact that lot 3 contains all the land the plaintiff purchased " and paid for, and the effect of the extension of the line " would be to give him about 117 acres of land to which " he seems to have no equitable right, still he contends the " law declares the land to be his."

After quoting that portion of the opinion in *Lammers* v. *Nissen*, *ante*, that the mere fact that a line " is run and is " designated upon the plats as a meandered line," cannot conclude or estop the government from treating the lands between the line and the bank as unsurveyed land belonging to it, the court say: " This, we think, states the " law correctly. The rule seems to be that if, *when the* " *entry of public lands is made*, the bank of the river *at an* " *ordinary stage* of water was in fact where the meander " line was represented by the survey, and land has since " been formed by accretion, it will become the land of the " person who has title to the land immediately behind it." * * * " *But the plaintiff does not claim the land in* " *controversy as an accreation, and has no right or title to* " *lots 6 and 7, as a part of lot 3.*"

A motion for a rehearing was made in the above case, and in October, 1889, another opinion was rendered, reported in the 43d N. W. Rep., 350, and not yet appearing in the Nebraska reports.

In this latter opinion the court say: " There is no proof " whatever that the land claimed by the plaintiff is an ac- " cretion to lot 3. In fact all of the proof tends to show " that it is not. The defendant has purchased his land, as " a part of the public domain, from the United States, and " it would be rank injustice to rob him of his property, " and give it to the plaintiff, who is already in possession

"of all of the land that he purchased and the government "sold to him.

"In addition to this, the official acts of public officers "will be presumed to have been lawfully performed, un- "less the circumstances of the case overturn this pre- "sumption; and acts done, which presuppose the exist- "ence of other acts, to make them legally operative, are "assumptive proof of the latter.

"*Bank* v. *Dandridge*, 12 Wheat., 70.
"*Coombs* v. *Lane*, 4 Ohio St., 112.
"*Ward* v. *Barrows*, 2 Ohio St., 241.
"*Tecumseh Town Site Case*, 3 Neb., 284.

"In the case at bar the proof tends to show that the "United States caused the defendants' land to be surveyed, "and offered the same for sale, and that the defendant or "his grantors became the purchasers. If this is correct, "the presumption is that the land in question was lawfully "surveyed and sold, and the burden of proof is on the "plaintiff to show, not only that the defendants' land is an "accretion to lot 3, but that the same was surveyed and "sold without authority of law, and in violation of his "rights.

"That a mistake was made in the original plat of the "government surveys there is no doubt, but *the plaintiff* "*has sustained no loss* by such mistake, and therefore, is "not in a condition to complain. It is evident that justice "has been done in the premises."

In *Hardin* v. *Jordan*, 16 Fed. Rep., commencing at bottom of page 826, Judge BLODGETT said: "I think, "however, that *the natural physical facts must control*, "*even against this plat*, by which it may be said Hol- "brook purchased; that is to say, there is and was at the "time of the survey two lakes instead of one.

"*There was a ridge, substantially dry, separating them,*
"*and this ridge was never surveyed.*

"*The government had the right, in 1874, to survey this*
"*dry ridge, which had never been surveyed, and put it on*
"*the market and sell it.*"

In that case, on that trial the shallowness and non-navigability of Hyde lake was not proven, and as to the bed of that lake, the judge assumed from the plat its navigability contrary to the fact, and applied the law of navigable waters. In the second trial before Judge Gresham, it was proven and held non-navigable, and so specially found by him as we have shown, and Jordan recovered not only the ridge but the bed of the lake. That appears from the transcript of the judgment and findings of the court, in evidence in this case.

Upon these authorities it must be concluded that this body of land, existing at the time of the survey of 1835, and most certainly at the time of DeWitt and Holbrook's entries, and extending continuously southwesterly to the high land at the south of Wolf and Hyde lakes formed no part of the fractional south-west quarter of fractional sections 19, 20 and 30, which were patented to DeWitt and Holbrook, but that those lots were limited to the meander line forming its boundary.

In addition to the above cases of *Granger* v. *Swart; Lammers* v. *Nissen*, and *Glenn* v. *Jeffery*, the case of *Martin* v. *Carlin*, 19 Wis., 454, is in point. In the latter case, also, the plat was erroneous in representing Rock river to be where it was land and not river at the time of the survey, and the plat was disregarded.

The conclusion is, therefore, irresistible that as to this body of land, the title remained in the government un-

affected by the survey of 1835, and that the patents to Condit, Field, Farrand, Rushmore and others of this omitted tract of government land passed to them a perfect title thereto, which was, as found by the court, vested in Jordan.

D. This discussion has proceeded thus far without regard to whether the sheet of water, now known as Hyde lake, was or was not, at the time of the survey of 1835, navigable water. The case in 1st Wolworth was situated, in part at least, upon Rock river, a stream. The case does not state whether navigable or not. The cases of *Lammers* v. *Nissen*, and *Glenn* v. *Jeffrey* were both upon a navigable river.

It may be contended on the other side that while the contention as to the uncovered land, when the survey of 1835 was made, and De Witt and Holbrook made their entries, may prevail, yet that those portions of sections 19, 20 and 30, which are covered by shallow water, when at datum, and those portions of section 29, which are in like manner covered by the waters of Wolf lake, as it now exists, did not pass to the patentees under the survey of 1874.

We have already stated and will not repeat it, that the proof and findings show conclusively that when the survey of 1835 was made, and DeWitt and Holbrook made their entries, Hyde lake, so-called, was non-navigable. It is not material in this case whether portions of Wolf lake were then navigable or not. There is no right asserted, in this case, which could prevail with respect to the title to that portion of Wolf lake, as it now exists, and is situated upon the east half of 29, if it was true, as we have contended, that this body of land then existed to the west of Wolf lake and remained unsurveyed, the

title of which was in the government. The section line between sections 29 and 30 does not, at any point, except for a short distance at the north end, run into Hyde lake. The only portion of the bed of Hyde lake, therefore, as to which the question of navigability or non-navigability, at the time of the survey of 1835, is pertinent, is the west half of the south-west of 20, and a small area adjacent to it on 29.

In the foregoing cases of *Lammers* v. *Nissen* and *Glenn* v. *Jeffrey*, the field notes, as well as the map, showed the meander line as run at the water's edge. On the contrary, in this case, although the map returned by the surveyor does not show the meander line, yet the field notes, which are offered in evidence, do show that this meander line was made up exclusively of right lines running from station to station upon stated courses, and that the stations were, many of them, distinguished by monuments, such as various kinds of timber; and, the soil over which these right lines were run is described in the notes.

The general principles of riparian rights are not controverted.

There ought to be no contention, but that a riparian owner upon navigable salt or fresh water, or navigable rivers within the ebb and flow of the tide, takes only to the water's edge.

That the title to the soil under such navigable waters in the United States, in the absence of any grant or patent, is in the several states where those bodies of water are situated, and that, as to such waters, the state is a trustee for the public for the purposes of maintaining the public right of navigation.

3 Kent Com., 427.

That riparian owners on navigable rivers, above the ebb and flow of the tide, and upon non-navigable streams also, take to the center thread of the river or stream.

Diedrick v. *The N. W. R. R. Co.*, 42 Wis., 262.
R. R. v. *Schurmier*, 7 Wall., 272.
Braxton et al. v. *Bressner*, 64 Ill., 488.

This much of the ground covered by the law of riparian rights ought not to be the subject of contention, and the authorities bearing upon any of these propositions have no place in this case. We have no contention with the other side with respect to these general principles of the law of riparian rights.

E. But it may become material to consider *what the rule of law is as to non-navigable lakes and ponds, confessedly neither streams nor rivers.*

It is the established law in the State of Illinois:

THAT WHERE LAND IS CONVEYED OR GRANTED ALONG OR UPON A NATURAL LAKE OR POND, THE CONVEYANCE OR GRANT EXTENDS ONLY TO THE WATER'S EDGE.

There ought to be no contention with respect to the correctness of the rule adopted by the Supreme court of the State of Illinois in the case of the *Trustees of Schools* v. *Schroll et al.*, 120 Ill., 519, drawing the distinction between the rule of riparian rights, as applicable upon a stream or river, and that applied where the land is situated upon a non-navigable lake.

The facts of that case are, that the lands in question were granted by the United States to the State of Illinois, as the sixteenth section, by act of Congress of April 18, 1818, for school purposes, and accepted by the state.

There was a lake on the tract know as "Meredosia "lake," connected by an outlet with the Illinois river.

In 1846, the proper school authorities, under the title acquired by the grant, platted the lands lying on both sides of the lake, into lots and sold the same.

Persons claiming riparian title under the purchasers of these lots, or some of them, entered into the possession of the bed of the lake, and claimed to own it as riparian owners. The school trustees brought this suit against the claimants to recover the bed of the lake.

In that case the Supreme court of Illinois determine the law to be in that state, that the riparian proprietor's title does not extend beyond the shore, and that this rule applies where land is conveyed, bounded along or upon a natural lake or pond. The court in that case, say: "An "entirely different rule applies when land is conveyed "bounded along or upon a natural lake or pond.

"*In such case the grant extends only to the water's edge.*"

There is no ground for contention that the sheet of water, known as Hyde lake, was at the time of the survey of 1835, or has ever since been, navigable water, or that it was or has been a stream.

The courts and text-writers have often defined what constitutes navigable water. Those bodies only are navigable, which are navigable *in fact* for purposes of commerce. The public right of navigation is limited to those streams and other bodies of water which are capable of public use. Gould on Waters, section 43 (p. 97) and note, and authorities. Also same author, section 54 (page 115) and note, and section 72. *McManus* v. *Carmichael*, 3 Iowa, 1; *Colchester* v. *Brooke*, 7 O. B., 339; *Mayor of Lynn* v. *Turner*, 1 Cooper, 86; *Miles* v. *Rose*,

5 Taunt., 706; *Rex* v. *Montagu*, 4 B. C. 598. Gould on Waters, section 43, page 97, says: If a channel connecting with navigable water, "is a small creek, navigable "only at exceptional and extraordinary times, or at cer- "tain states of the tide, and then only for a short time "and by very small boats, its adaptability for general use "is strong, if not conclusive, evidence against the exis- "tence of a public right." In a note to the section, the author adds: "It is now settled that the public right is "limited to those streams and inlets which are capable "of public use." In the case of *The Monticello*, 20 Wall., 439, Justice DAVIS, delivering the opinion of the Supreme court said: "This court held in the case of *The* "*Daniel Bell*, (10 Wall., 557) that those rivers must "be regarded as navigable rivers in law which are navi- "gable *in fact*. And they are navigable in fact when "they are *used*, or are susceptible of being used in their "ordinary condition, as highways for commerce, over "which trade and travel are or may be conducted in the "customary modes of trade and travel on water. And "a river is a navigable water of the United States, when "it forms by itself, or by its connection with other waters, "a continued highway over which commerce is or may "be carried on with other states or foreign countries in "the customary modes in which commerce is conducted "by water." Such is the rule in this country.

Rowe v. *Granite Bridge Company*, 21 Pick., 344.

Charleston v. *County Commissioners*, 3 Met., 202.

Attorney General v. *Woods*, 103 Mass., 437.

United States v. *New Bedford Bridge*, 1 Wood and M., 401.

Weathersfield v. *Humphry*, 20 Conn., 218.
Grotin v. *Hurlburt*, 22 Conn., 178.
Burrows v. *Gallup*, 32 Conn., 501.
Brown v. *Preston*, 38 Conn., 219.
Glover v. *Powell*, 10 N. J. Eq., 211.
Flannagan v. *Phil.*, 42 Penn. St., 219.

The evidence in this case shows that the bed of Hyde lake, except as to a very small area on the west side of the lake, extending from about the half section east and west line on section 20 to below the half section, east and west line on section 30 (this being the northerly and southerly limits of Hardin's fractional tracts on sections 19 and 30), is, and probably always has been, above datum, and that the excepted portion, above indicated, will not average six inches below datum.

The waters are supplied by rain fall, within the watersheds, the melting of ice and snow and by springs in the bottom of the lake. There is no current or thread to it. The waters cannot flow out until they rise above the western rim of the lake and cannot flow in until the excess of waters, accumulated by reason of freshests, rainfall or winds, rise above this rim. When the former occurs there is a temporary flow from the basin over the rim. In the latter case there is a temporary flow in the reverse direction. Waters are only thus moved temporarily in divers directions and by the winds brought to bear upon the surface of the water. This makes Hyde lake clearly fall within the definition of non-navigable ponds and lakes, and within the rule applied by the court in the Meredosia lake case, which was held to be a lake and not a part of the Illinois river, and which ruling is supported by all of the authorities.

Gould says: "A river is a running stream of water "pent in on either side by banks, shores, or walls. * * * "Every river consists of: (1) the bed; (2) the water; (3) "the banks or shores; and it also has a current. It is a "river or water course from the point where the water "comes to the surface and begins to flow in a channel "until it mingles with the sea, the arms of the sea, lakes "etc. It may sometimes be dry, but in order to be with- "in the above definition it must appear that the water "usually flows in a particular direction, and has a regu- "lar channel; with bed, banks, or sides." * * * "The "bed, which is a definite and commonly a permanent "channel, is the characteristic which distinguishes these "waters from mere surface drainage, flowing without a "defined course or certain limits, and from water perco- "lating through the strata of the earth, both of which are "not subject to riparian right, but form part of the realty "and belong exclusively to the owner thereof. The fact "that these waters have a current gives rise to questions "relating to the obstruction and acceleration of the waters "which do not arise in the case of still waters, like lakes "and ponds. A stream necessarily involves the idea of a "*current;* and a statute which provides for bridges over "streams separating towns confers no authority to con- "struct bridges over lakes, bays or marshes, in which the "water has no preceptible flow."

Gould on Waters, Sec. 41.

All these positions in the text are well supported by reference to numerous cases.

On the other hand, the same author defines lakes and ponds thus: "Fresh water lakes and ponds are bodies of "standing water distinguishable from rivers chiefly by "the fact that they have no current." * * * "The

"fact that there is a current from a higher to a lower "level does not make that a river which would otherwise "be a lake, nor does a lake lose its distinctive character, "because *there in a current to it for a certain distance "tending towards a river* which forms its outlet. On the "hand, the fact that a river broadens into a pond like "sheet with a current does not deprive it of its character "as a river."

Gould on Waters, Sec. 79.
Angell on Water Courses, 7th Ed. 4f.

These positions of the text are fully supported by the cases cited in support, among which is the case of the *State* v. *Gilmanton*, 9 N. H., 463; and 14 N. H., 476.

These authorities certainly justify the court in the Meredosia lake case in finding it a lake and not a stream.

But the special finding of the court in the case at bar, that "the land and water are substantially what they "were at the time of the original survey, and that the "lake or lakes are non-navigable waters," is conclusive upon this question.

Certainly if Meredosia lake was a lake within these authorities, Hyde lake is. The differences between the two bodies of water are that Hyde lake is less than two miles long and a half a mile wide, while Meredosia lake is five or six miles long and in places a mile wide; that Meredosia lake is in close contiguity with the Illinois river, a navigable stream, while Hyde lake is some four or five miles from Lake Michigan and eighty to 100 rods from the Calumet river, both navigable bodies of water, in both cases connection being made from an "outlet" to the Illinois river in the one case, and to the Calumet river in the other, and that as the court states, it did not appear

whether portions of Meredosia lake was in fact navigable, while it does appear, in this case, that the bed of Hyde lake in the lowest part is very near "datum."

In the two cases, these bodies of water are without current, but during portions of the year currents of water pass through their outlets to the Illinois and Calumet rivers respectively, but the flow of water from the lakes is sometimes "stopped in summer." Both lakes receive their supply of water from springs in their beds, rainfall and melting ice and snow, but, in their natural state, irom no other independent body of water.

It is clear, therefore, that Hyde lake, within the rule adopted, or rather followed, in the Meredosia lake case is a non-navigable lake and not a stream. This is not controverted.

Hyde lake, therefore, being a non-navigable pond or stream at the time of the survey of 1835, the question arises whether or not the title to any portion of this lake bed became subject to the riparian claims of any of the owners of fractional lots under that survey. It is clear from the authorities that it did not, but that like the uncovered lands, which existed at the time of that survey, the title remained in the Government of the United States.

F. *The bed of Hyde lake being non-navigable did not pass to the State of Illinois, as the trustee for the public, and conservator of the right of public navigation.*

The title to so much of this lake bed as is contained in sections 19, 20, 29 and 30 passed to Jordan by *mesne* conveyances from the patentees as unquestionably as it did to that part of the tract which was uncovered at the time DeWitt and Holbrook made their respective entries.

It is competent for the government to pass title to non-navigable lake beds, and they are often the subject of private conveyance. It is a matter of very frequent occurrence that non-navigable lakes and ponds are patented and conveyed as forming parts of congressional subdivisions. The validity of these titles has been frequently declared by the courts.

It has been the uniform practice, also, of the United States Government, where non-navigable lakes and ponds have been meandered to subsequently survey and patent the lake beds.

Rogers v. *Jones*, 1 Wend., 255;
Canal Commissioners v. *The People*, 5 Wend., 448;
Smith v. *Miller*, 5 Mason (U. S. C. C.), 191;
Coovert v. *O'Connor*, 8 Watts, 470;
Angell on Water Courses, Sec. 6;
Ledyard v. *Ten Eyck*, 36 Barb., 102.

In the case of *Ledyard* v. *Ten Eyck*, 36 Barb., 102, it was held that a patent which embraced within its description a portion of Cazenovia lake carried the title to the bed of the lake covered by the description to the grantor.

In the case of *Rogers* v. *Jones*, 1 Wend., 255, the court had said: "It cannot be doubted, that when a patent or "grant conveys a tract of land by metes and bounds, the "*land under water* as well as other land will pass, if the "land under water lies within the bounds of the grant. "A contrary doctrine would exclude the lands under the "water of lakes and streams not navigable. Scarcely a pat-"ent ever issued in this state, that does not include one or "the other; and so far as I know, no question has ever

"been raised on this ground. The authority cited from "2 Black. Com., 19, does not bear out the position, but "est ablishes the contrary. The author states, that if a "man grants his lands he grants all his mines, woods, "*waters*, etc., as well as his fields and meadows."

In the case of *Canal Commissioners* v. *The People*, 5 Wend., 448, Chancelor Walworth held, that waters and islands in rivers, which were included within the bounds of the Van Rensselaer's patent and in terms granted were passed to the patentee and his assigns.

In the case of *Smith* v. *Miller*, 5 Mason, 191, the plaintiff claimed as lessee for 500 years of a dam or pond "together with all the land, which may be flooded by "raising said dam seven feet high from the bed or bottom "of the river."

In deciding the case Justice STORY said: "The lease "having conveyed all the land *under the pond*, it passed "the pond of water and the fish therein to the plaintiff, "*as incident to the principal grant*."

The grant to William Penn, in Pennsylvania, vested in him the title to all streams and bodies of waters not navigable, falling within the limit of his grant, and the owner could convey the stream or body of water and the title to the soil under them to one person and the adjoining land to another.

Angell on Water Courses, Sec., 6.
Coovert v. *O'Connor*, 8 Watts., 470.

In the Meredosia lake case, the court held that the title to the bed of the lake, and the lake itself, vested in the trustees of schools by virtue of the Act of Congress, granting the sixteenth section to the State of Illinois for school purposes, and the Act of the Legislature accepting

the grant. In that case the school trustees recovered the lake.

In this the court was fully justified by the authorities which I have above quoted. On the same principle Hyde lake, being a non-navigable lake, the patents to Farrand, Rushmore, Condit and others vested in them an absolute title, not charged with any public or private easement or use, and through them in Jordan. Being non-navigable, there was no public right of navigation, and they could be charged with no easement, because an easement in non-navigable waters cannot exist, except by grant or prescription, neither of which is claimed or can be claimed in this case.

Cook v. *Stevens*, 11 Mass., 533.
Stevens v. *Stevens*, 11 Met., 255.
Gould on Waters, Sec. 300, note 3.

G. The principle announced, as we have seen, by the court, in the Meredosia lake case, *that shore owners on ponds and non-navigable lakes are limited to the water's edge*, is fully sustained by the most trustworthy and reliable line of authorities.

In *Wheeler* v. *Spinola*, 54 N. Y., 385, the court say: "Neither can the rule as to riparian ownership be ap-"plied to this pond which is applied to ordinary fresh "water streams. A boundary upon it does not carry "title to its center, but only to low water mark. Such "is the rule as to boundaries upon natural ponds or "lakes."

It was said by Chancellor Walworth in *Canal Commissioners* v. *The People*, 5 Wend., 446, speaking of the rule that riparian owners on streams take to the center thread "the principle itself does not appear to be suffi-

"ciently broad to embrace our large fresh water lakes, "or inland seas, which are wholly unprovided for by the "common law of England. As to these there is neither "flow of the tide or thread of the stream, and our own "local law appears to have assigned the shores down to "the ordinary low water mark to the riparian owners."

In the case of *Champlain & St. Lawrence R. R. Co.* v. *Valentine*, 19 Barb., 490, the court say: "From the na- "ture of things, in many particulars, it is not adapted to "our lakes. The English have no large inland bodies of "stationary fresh water, or even salt, unaffected by the "tide. Nor is there anything similar to our great lakes, "in those parts of the Old World where the civil law has "prevailed. * * * Some of our judges and jurists "have not hesitated to declare an opinion, that the law "in relation to the rights of riparian owners on rivers, "above the flux and reflux of the tide, does not prevail "in our great lakes."

Similar language is held in *Kingman* v. *Sparrow*, 12 Barb., 206.

The case of *Ledyard* v. *Ten Eyck*, 36 Barb., 102, while seeming to be in conflict with these cases, by reason of *obiter dicta* is not.

In that case Cazenovia lake was treated as navigable. The state, acting as trustee for the public, lowered the outlet, and thereby made the land out of the lake bed, which was subsequently occupied by the defendant, and was the subject of litigation.

By a seeming common consent, although said not to be navigable, it was actually used by the public.

In the case of *Waterman* v. *Johnson*, 13 Pick., 265, the land involved was bounded by a natural pond. Chief

Justice SHAW, in delivering the opinion of the court, says: "A large natural pond may have a definite low "water line, and then it would seem to be the most nat- "ural construction, and one which would be most likely "to carry into effect the intent of the parties to hold, "that land bounded upon such a pond would extend to "low water line."

In the case of the *Inhabitants of Roxbury* v. *Stoddard, et al.*, 7 Allen, 167, the court say: "The rules of law "which apply to questions of boundary on rivers have "never been considered applicable to the great lakes, or "fresh-water pounds. The boundary on a natural pond "exten ds only to low-water mark."

In the case of *Paine* v. *Woods*, 108 Mass., 170, the co urt, speaking by Justice Gray, now of this honorable court, affirms the doctrine that a grant bounded by a pond or lake extends to low water mark, citing the opinions of Chancellor Walworth in *Canal Commissioners* v. *People*, 5 Wend.; Chief Justice Shaw in *Waterman* v. *Johnson*, 13 Pick., Justice Hoar in *West Roxbury* v. *Stoddard*, 7 Allen, and other cases.

That the shore owners did not take title to the bed of the pond involved was held in *Hittinger* v. *Eames*, 121 Mass., 546.

In the case of *Primm et al.* v. *Walker*, 38 Mo., 99, the court say: "Doubtless, when the call is for a pond "merely, or for metes and bounds along the bank of a "river, the margin of the pond at low water, or the edge "of the bank, on many authorities, is to be taken as the "boundary."

In the case of *Bradley* v. *Rice*, 13 Mo., 201, the court say: "Had the land been bounded upon a river or

"stream, or upon an artificial pond created by expanding "a stream by means of a dam, the riparian proprietor "would go to the thread of the stream. This is law well "settled and understood.

"But it has not been so settled with regard to ponds "and lakes. Nor are we aware, that there can be one "construction for small ponds or lakes, and another for "large ones. Where shall the line be drawn?"

This principle was recognized by the same court in *Nelson* v. *Butterfield*. 21 Mo., 229. In that case there was an arm or cove running across the land from the pond, and the principle was carried out by treating this arm or cove as not a part of the body of the pond and thus giving effect to the clear intention of the parties expressed in the conveyance.

In the case of *Wood* v. *Kelley*, 30 Mo., 53, the land involved was bounded "easterly on said south pond."

"South pond appeared to be a natural body of fresh "water, the height and extent of which had been in-"creased for more than twenty years before the com-"plainant purchased his land bounded upon it."

The jury were instructed that the complainant acquired a title to the land bounded upon the pond, to the margin of the pond at low water mark, considering the pond to be permanently enlarged by reason of the mill-dam.

The court sustained this instruction.

In *Robinson* v. *White*, 42 Mo., 218, it is said: "When "land is bounded upon a lake or pond, if it is in its nat-"ural state, it would seem that the grant extended only "to the water's edge."

The court say, in *Mansur* v. *Blake*, 62 Mo., 41: "Where land is bounded by a pond in its natural state,

"the grant, it would seem, extends only to the water's "edge."

In *The State* v. *Gilmanton*, 9 N. H., 463, the court say: "When a grant is made extending to a river, and "bounding upon it, the centre of the stream is the line "of boundary, if there is no limitation in the terms of "the grant itself.

"But in relation to grants bounding on ponds, lakes or "other large bodies of standing fresh water, that prin-"ciple does not apply, but the grant extends only to the "water's edge."

In *Fletcher* v. *Philips*, 28 Vt., 268, after stating the rule as to streams, the court say: "A different rule pre-"vails where land is conveyed bounded on large natural "ponds or lakes; in such case the grant extends to the "water's edge, or if, as observed by Ch. J. Shaw, in "*Waterman* v. *Johnson*, 13 Pick., 261, the lake or pond "have a definite low water line, the grant will extend to "low water." The tract involved in this case was upon the shore of Lake Champlain.

In the case of *Jakeway* v. *Barrett*, 38 Vt., 323, the tract involved also lay near the same lake.

Plaintiff and defendant owned contiguous tracts. Defendant and his grantors had occupied and cut hay on about five acres of land lying between low and high water marks, for a period of time sufficient to bar an action.

The court held that the plaintiff's land was limited to the high water line, and that the defendant's occupancy of the land in dispute, claiming the same under his deed, although not in fact embraced therein was a bar to recovery.

In *Austin et als.* v. *Rutland R. R. Co. et als.*, 45 Vt., 242, it is said there is no *common law* of Vermont, by which the owner of land bounded on Lake Champlain has a right beyond low water mark to appropriate as his own the bed of the lake. Neither the legislature nor the courts have recognized any such right.

The same rule is held in Wisconsin. In *Mariner* v. *Schulte*, 13 Wis., 698, Chief Justice Cole affirmed an instruction of the inferior court which instructed a jury that such was the law.

Thus this line of authorities, followed by the Supreme court of Illinois in the Meredosia lake case, establishes the rule as claimed by us and as laid down by that court.

Many of the authorities, which are given on the other side and claimed to establish a different rule, are cases where the entire shore on all sides of the lakes and ponds in question are held by the same person, or where the area of the non-navigable lake or pond was estimated and paid for as a part of the lands granted or patented. While contending that there is no analogy, or authority, from any of the English cases for such a rule, because of absence of such bodies of water in England, and because the rule claimed in these cases is one applied to navigable and not to non-navigable bodies of water, the most that can be contended for with respect to these conflicting cases is that they constitute an exception to the rule and not the rule itself. This question is fully discussed and clearly decided by Judge Gresham in the case of the *State of Indiana* v. *Milk*, 11th Fed. Rep., 395. He says: "Non-navigable streams are usually narrow, and the "lines of riparian owners can be extended into them at "right angles without interference or confusion, and with-"out serious injustice to any one. It was therefore

"natural, when such streams were called for as bound-
"aries, to hold that the real line between opposite shore
"owners was the thread of the current. The rights of
"the riparian proprietors in the bed of the stream, and in
"the stream itself, were thus clearly defined. But when
"this rule is attempted to be applied to lakes and ponds,
"partial difficulties are encountered. They have no cur-
"rent, and being more or less circular, it would hardly
"be possible to run the boundary lines beyond the
"water's edge, so as to define the rights of the shore
"owners in the beds. Beaver lake is seven and a half
"miles east and west, and less than five miles north and
"south. Extending the sides and end lines into the lake,
"there being no current, where would they meet? This
"rule is applicable, if at all, whether there be one or
"more riparian proprietors. I do not think the mere
"proprietorship of the surrounding lands will, in all cases,
"give ownership to the beds of natural non-navigable
"lakes and ponds, regardless of their size. It would be
"unfair and unjust to allow a party to claim and hold
"against his grantor the bed of a lake containing thous-
"ands of acres, solely on the ground that he had bought
"and paid for the small surrounding fractional tracts—
"the mere rim.

"A person might, by purchasing the lands surrounding a
"small lake, in view of its size and other circumstances, be
"held to own the bed. Each case depends largely on its
"own facts. *Forsythe* v. *Smale*, 7 Biss., 201."

While a general grant of land on a river or stream, non-navigable, extends the line of the grantee to the middle or thread of the current, a grant to a natural pond or lake extends only to the water's edge.

It is the established doctrine of the Supreme court of the

United States, that the Supreme court of each state may determine for each state the rule which it will adopt with respect to riparian rights upon non-navigable waters within the several states of individul contestants. *Barney* v. *Keokuk*, 94 U. S. (4 Otto), 228.

H. *Whether, therefore, the mathematical line run by the surveyor as established by the monuments at the intersection of section lines, or the water's edge at high, low or ordinary stage of water was the real boundary, the title acquired by the patentees of the fractions was limited to the boundary line and no riparian rights are involved.*

The well recognized rule that distances and courses must yield to monuments and natural objects, where the two conflict, and that other rule, which the courts have sometimes adopted, that where a meander line is run along, or near, a body of water, the boundary should be taken to be the water's edge, and the fiction entertained (which is believed to be limited to the meander of navigable bodies and streams) that the line is run by the surveyor for the ascertainment of the quantity of land merely relate only to *boundaries* of tracts surveyed, and neither imply nor admit any rights to the patentees beyond the *boundary line.*

The question whether the patentee has any riparian rights is entirely distinct and independent from the question as to *where the boundary of his tract is.*

It is a well established principle that riparian rights are entirely independent of the title to the soil under the water. As is said in *Diedrich* v. *The N. W. Ry. Co.*, 42 Wis., 262: "Riparian rights proper are held to rest "upon title to the *bank* of the water, and not upon title "to the *soil under the water;* riparian rights proper being

" the same, whether the riparian owner owns the soil " under the water or *not*. And distinguished from the " right arising in case of gradual and insensible accretion " or reliction, the general right of *appropriating* and " *occupying the soil under the water*, when such right may " exist, is not properly a riparian right resting *not* upon " title to the *bank* only, but more directly *upon title to the* " *soil itself under the water.* * * * The rule that the " right of appropriation and occupation of the bed of the " water, when such right exists, *rests upon title to the bed* " *of the* water itself, and *not* upon title to the bank only, " appears to be a principle nearly self-evident. * * * " When the water is *not* navigable (as is the case with " respect to Hyde lake and ever has been), *the public* " *has no easement;* and the riparian owner" (if the title to the bed is also in him), " may, in general, put his " estate *under the water* to any proper use he may " please."

Whether then the patent issued to Holbrook conveyed to the mathematical meander line, as shown by the field notes, or to the water's edge at the time of the survey, or the purchase by Holbrook, the bed of Hyde lake did not pass nor was its waters charged with any easement or use, public or private, and the only difference it would make by giving the one construction or the other would simply relate to the margin of the land at such time lying between the mathematical meander line and the edge of the water.

That it is difficult to furnish evidence as to where the line of water would be, or was when the meander line was run, is no objection to the position, because the difficulty of obtaining proof is not an argument against the application of a rule at law. Difficulties of that sort are

met and overcome by the courts, as best they may be, in every day's practice.

The rule would seem to be, where courts have applied it, that where riparian rights exist the water's edge at the time the purchaser from the government acquired title, is the boundary line. The existence of riparian rights here is admitted only for the sake of argument.

In this case there could be no serious difficulty, because so far as relates to the water boundary on Hardin's fractions in the north half of 30 and the south half of 19, the plat would seem to show that the water came up to the meander line, and that the two coincided upon these tracts. The presumption, therefore, would be, until overthrown by Hardin by proof of a margin up to the time Holbrook took his patent, that the water line and the meander line coincided as the eastern boundary of these fractions. So far as the north line of the south-west quarter of section 20 is concerned, the plat shows water to have extended beyond that quarter to the north for some distance, so that the difficulty suggested in no event would arise in this case.

Counsel for plaintiff entirely agree with us in both, that the state has no easement in Hyde lake, and that the title in the owner of the soil under the lake is proprietary. The only contention on his part being that that proprietary title belongs to his client and not Jordan, while our contention is that Jordan is the proprietary owner discharged from all public and private easements.

If, however, it had been made to appear as a fact, that at the time Holbrook purchased these tracts on 19 and 30, there was a margin between the meander line, as actually run, and the water, and Holbrook should be held to

have taken by his patent to the water's edge, there would simply as to this margin be an overlying and an underlying patent, in which case, as to such margin, the earlier patent would prevail, but such a contingency would in no wise affect the validity of the junior patent beyond the boundary line of the tract granted to Holbrook. On the contrary, the patent under the survey of 1874 would carry a perfect title from the boundary line of lands granted in the Holbrook patent. The land adjacent to the DeWitt tract, running south continuously to the southwest corner of 29, between Wolf and Hyde lakes, as lands omitted, could only be regarded in any case as the unsurveyed land of the United States.

In conclusion, upon this branch of the case, we have shown that these lands were omitted from the survey of 1835 by mistake or negligence, within the cases of *Lammers* v. *Nissen* and *Glenn* v. *Jeffrey;* that the meander line should either have been run along the margin of Wolf lake as it then existed and still exists, including in the survey of 1835 the large tract of land between Wolf lake and the sheet of water known as Hyde lake; that it being shallow water, and the bottom being generally about datum, and none of it but a few inches below, the title remained in the government; that as to such portions of the west side of Wolf lake as are involved in this suit, Hardin cannot question the right of Jordan; and that as to the same, and as between them and the government patenting these lands and receiving their money, their titles are good; and that, therefore, in any view which may be taken of this branch of the case, these lands belonged to the United States at the time of the survey of 1874. It should be observed, also, that this, in any sense, was not a re-survey. The survey, made by Wolcott, re-established the

old meander line precisely where it was run in 1835. He found all of the monuments on the meander line, shown by the old field notes. The other lines were the extension of the east and west, north and south lines of the old survey made by actual measurements, and the establishment of the corners shown in the latter survey.

II.

HARDIN AND DEWITT HAVING BEEN NOTIFED, AND HAVING APPEARED BEFORE THE REGISTER AND RECEIVER OF THE LOCAL LAND OFFICE; HAVING APPEALED TO THE COMMISSIONER OF THE GENERAL LAND OFFICE; AND FROM HIS DECISION TO THE SECRETARY OF THE INTERIOR; AND CONTESTED IN THE LAND DEPARTMENT, BEFORE THESE OFFICERS OF THE GOVERNMENT, THE QUESTION WHETHER OR NOT THE LANDS EMBRACED IN THE SURVEY OF 1874 BELONG TO THE GOVERNMENT; AND THE DECISION OF THE SECRETARY OF THE INTERIOR, THE HIGHEST AUTHORITY IN THE DEPARTMENT, HAVING BEEN ADVERSE TO THEM; AFTFR SUCH A CONTEST AND THE QUESTION HAVING BEEN DECIDED UPON EVIDENCE ADDUCED, BEARING UPON THE QUESTION AS A FACT, THEY AND THEIR GRANTEES ARE ESTOPPED BY THE DECISION OF THE SECRETARY OF THE INTERIOR FROM AGAIN CONTESTING THE QUESTION IN THE COURTS.

The proof in this case shows that DeWitt and Hardin were notified by the register and receiver of the local land office, of the filing of the survey, and the hearing upon the application of the claimants of these lands; and that they appeared and put in issue, in writing, and in-

sisted upon a decision, before patents should issue, whether these lands had not passed under the Holbrook and DeWitt patents, and did or did not belong to the United States. Proof was introduced before the register and receiver of the local land office, as to the physical conditions and changes in the tract involved in this suit, at and since the time when the Holbrook and DeWitt patents were issued; and an issue of fact was formed and tried, *necessarily including the issue whether this lake was navigable in fact*, and the local land officers found the issue adversely to the claims of Hardin and DeWitt thereon. From that decision Hardin and DeWitt appealed to the commissioner of the General Land office, and the question was decided by the commissioner upon that appeal, in 1878, to the effect, that these lands involved in this suit belonged to the United States, and were patentable. From this decision of the commissioner, DeWitt and Hardin again appealed to the Secretary of the Interior, and in May, 1880, the Secretary Schurz affirmed the decision of the commissioner of the General Land office. This decision of the Secretary of the Interior—the head of the land department—was never appealed from and remains in force.

It has long been the established doctrine of the Supreme court of the United States, that the decisions of the Land Department necessarily made, within the legitimate limits of proceedings in that department, in the acquirement of title to the public lands, under the various modes provided by statute, are final and conclusive upon the parties, and cannot be again drawn in question. In the case of *Johnson* v. *Towsley*, 13 Wallace, 83, the court said: "That the action of the land office in issuing a "patent for any of the public land subject to sale by pre-

"emption or otherwise, is conclusive of the legal title, "must be admitted under the principle above stated, and "in all courts, and in all forms of judicial proceedings, "where this title must control, either by reason of the "limited powers of the court, or the essential character "of the proceedings, no inquiry can be permitted into the "circumstances under which it was obtained."

In the case of *Warren* v. *Van Brunt*, 19 Wallace, 653, the same doctrine is affirmed, and the court say: "This "question has recently been fully considered by this court, "in the case of *Johnson* v. *Towsley*, and it is there held "that 'When those officers decide controverted questions "of fact, in the absence of fraud or imposition, or mis-"take, their decision on those questions will be final.'"

In the case of *Sheply et al.* v. *Cowan et al.*, 91 U. S., 340, the court again says: "The officers of the land de-"partment are specially designated by law to receive, con-"sider and pass upon proofs presented with respect to "settlements upon the public land." * * * "For "mere errors of judgment upon the weight of evidence "in a contested case before them, the only remedy is by "appeal from one officer to another of the department, "and, perhaps, under special circumstances, to the presi-"dent." The same doctrine is reaffirmed in *Moore* v. *Robins*, 96 U. S., 530, and *Marquiez* v. *Frisbie*, 101 U. S., 473.

In *Vance* v. *Van Brunt*, 101 U. S., 519, it is again said: "The appropriate officers of the land department "have been constituted a special tribunal to decide such "questions, and their decisions are final to the same ex-"tent that those of other judicial or quasi-judicial tribun-"als are." That case decides that where false testimony

or forged documents had been used, before the department, upon the issue being tried, it would not affect the binding force of the decision, were no appeal taken.

In the case of the *United States* v. *Schurz*, 102 U. S., 401, the court said: "To the officers of the land department, among whom we include the Secretary of the "Interior, is confided, as we have already said, the administration of the laws concerning the sale of the public domain." * * * "The question whether any "particular tract, belonging to the government, was open "to sale, pre-emption or homestead right, is in every instance a question of law as applied to the facts for the "determination of these officers. Their decision of such "question and of conflicting claims to the same land by "different parties is judicial in its character. It is clear "that the right and the duty of deciding all such questions belong to these officers, and the statutes have provided for original and appellate hearings in that department before the successive officers of higher grade up "to the secretary."

In the case of *Smelting Company* v. *Kemp*, 104 U. S., 646, Justice FIELD, speaking for the court said: "A "patent in a court of law, is conclusive as to all matters "properly determinable by the land department, where "its action is within the scope of its authority, that is, "where it has jurisdiction under the law to convey the "land. * * * Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, "goes so far that if in any circumstances under existing "law a patent would be held valid, it would be presumed "that such circumstances existed. * * * If in issuing a patent its officers took mistaken views of the law, "or drew erroneous conclusions from the evidence, or

"acted from imperfect views of their duty, or even from "corrupt motives, a court of law can afford no remedy "to a party alleging that he is thereby aggrieved."

In the case of *Steele* v. *Smelting Company*, 106 U. S., 447, the patent was assailed, because it was claimed that the same had been previously appropriated as a town site. The land department had passed upon the question as to whether or not the land was patentable, and had granted a patent to the plaintiff. The Supreme court in deciding the case (page 450) said: "Whether there "are rights thus interfered with which should preclude "the location of the mine and the issue of a patent to "him or his successor in interest, is, when not subjected "under the law of Congress to the local tribunals, a mat- "ter properly cognizable by the land department when "application is made to it for a patent, and the inquiry "thus presented must necessarily involve a consideration "of the character of the land to which title is sought, "whether it be mineral, for which a patent may issue, "or agricultural, for which a patent should be withheld. "* * * Necessarily, therefore, it must consider and "pass upon the qualifications of the applicant, the acts he "has to perform to secure the title, *the nature of the land*, "and *whether it is of the class which is open to sale.* * * * "The validity of a patent of the government cannot be "assailed collaterally, because false and perjured testi- "mony may have been used to secure it, any more than "a judgment of a court of justice can be assailed collat- "erally on like ground." (Page 453.)

The case of *Quinn* v. *Conlon*, 104 U. S., 421, was one where the officers of the land department were called upon to decide whether the lands involved were within the limits of and covered by a prior Mexican grant, or

whether by the survey of the government and the appropriation of other lands to its satisfaction, they were excluded from the operation of the grant. and open to pre-emption—or, in other words, belonged to the United States. In that case, this court re-affirmed, in the strongest language, its prior rulings on the question; and, in speaking of the land department, said: "The "alleged erroneous rulings of the officers of the land "department * * * were upon mere matters of fact, or "upon *mixed questions of law and fact, which were prop-* "*erly cognizable and determinable by the officers of that* "*department.*" * * * "For mere errors of judg- "ment as to the weight of evidence on these subjects, by "any of the subordinate officers, the only remedy is an "appeal to his superior of the department. The courts "cannot exercise any direct appellate jurisdiction over "the rulings of those officers, or of their superior "in the department in such matters, nor can they reverse "or correct them in a collateral proceeding between pri- "vate parties." * * * "The question whether the "land in controversy had been freed from its reservation "under the Mexican grant so as to be open to settlement "and pre-emption depended upon matters disclosed by "the record of proceedings in the land department, "namely, that the public surveys had been extended over "the lands, and that other lands had been appropriated to "the satisfaction of the grant."

This doctrine was again affirmed in the recent case of *Baldwin* v. *Stark*, 107 U. S., 465.

The case of *Cowell* v. *Lammers*, 21st Fed. Rep., 200 decided by Judge Sawyer, on the circuit, is in accord with this line of authorities as applicable to the question decided in this case. In that case (page 205), after

quoting from the act of Congress of 1796 the language: "These field-books shall be returned to the Surveyor-"General, who shall thereupon cause a description of the "whole land surveyed to be made out, and transmitted *to* "*the officers who may superintend the sale*," (St. P., 466 Par. 2), the court says: "The object, doubtless, is to "enable the officers in charge to determine *whether the* "*lands are patentable or not.*

"This provision has been in force ever since, and it is "carried into the Revised Statutes (section 2,396): * * * "'Thus the government has provided means to enable "the land officers *to determine the character of the land*, "and whether or not they are of the character granted "by the acts, or *authorized to be sold or otherwise dis-*"*posed of*.' Again the court says, at page 208: 'The "sooner it comes to be a generally recognized principle, "that a United Ststes patent, regular upon its face and "upon the record, issued in the form prescribed by law, "means *something*, that it is unassailable collaterally, or "or even with success directly, by parties having the "proper *status*, except upon clear and indisputable ground "and evidence, the sooner confidence in land titles will be "re-established.'"

The same principle is also affirmed by Judge Brewer, in the case of *Wright* v. *Dubois*, 21 Fed., 694.

In the case of *Sheply* v. *Cowan et al.*, *ante*, two patents had been issued for the same land, one by the State of Missouri, under a congressional grant made in 1841, and the other by the United States in 1866, upon a pre-emption claim. Other acts of Congress had been passed with special reference to the land involved, and various surveys had been made.

The land department *determined* that, notwithstanding the prior patent by the State of Missouri, under a prior congressional grant, the property *belonged to the United States*, and was subject to the pre-emption claim, and awarded a patent. The Supreme court of the United States in this case held that the decision of the Secretary of the Interior was conclusive.

Sheply v. *Cowan et al.*, 1 Otto, 340.

See, also, the recent cases of

Terry v. *Strub*, 18 Legal News, 2.

Also,

Aurora Hill Con. Min. Co. v. *85 Min. Co. et al.*, 34 Fed. Rep., 515.

In the recent case of *Cragin* v. *Powell*, 128 U. S, 593, the sourt, by LAMAR, justice, say: "That whilst the lands "are subject to the supervision of the General Land Of- "fice, the decisions of that bureau in all such cases, like "that of other special tribunals upon matters within their "exclusive jurisdiction, are unassailable by the courts, "except by a direct proceeding; and that the latter have "no concurrent or original power to make similar correc- "tions, if not an elementary principle of our land law, is "settled by such a mass of decisions of this court, that "its mere statement is sufficient."

Citing, with other cases:

Haydel v. *Dufresne*, 17 How., 23.
Steele v. *St. Louis Smelting & Refining Co.*, 106 U. S., 447.
Pollard et al. v. *Dwight*, 4 Cranch, 439.
West v. *Cochran*, 17 How., 403.
Stanford v. *Taylor*, 18 How., 409.
Gazzam v. *Phillips*, 20 How., 372.

United States v. *San Jacinto Tin Co.*, 125 U. S., 273, and
Frasher v. *O'Connor*, 115 U. S., 122.

The case at bar clearly falls within these decisions and is controlled by them. The officers of the land department necessarily passed upon the question, largely of fact, whether these lands belonged to the United States. The consideration of that question involved an examination of the records of the land department, including the field notes of the two surveys, the evidence adduced in connection with the application for the survey, the return of the officer making the survey of 1874, with the proof connected therewith as to the condition of these lands, the consideration of the evidence as to the *status* of this omitted tract, whether it was land, whether the portions covered by water were navigable or non-navigable, what changes had taken place, if any, and necessarily required them to decide a mixed question of law and fact, largely of fact, which, according to all these decisions, they not only had a right, but it became their duty to do.

That decision, as we have seen, was in accordance with the authorities, but whether it was or not it became, and ever must remain, conclusive as against DeWitt and Hardin and their grantees. The question is simply whether the land department, in the proceedings culminating in these patents, under which these defendants hold, and, to which proceeding Hardin and DeWitt were contesting parties, had jurisdiction to consider and decide the issue formed by them—whether the lands in question belonged to the United States. Had the patents to the fractional tracts purported to convey these lands, and had the acreage purchased and paid for by Holbrook and De-

Witt embraced them, the jurisdiction would not be claimed to exist. But the acreage purchased and paid for, and covered by the description in the patents, did not extend beyond the meander line.

An examination of the opinions of the commissioner fo the general land office, secretaries Schurz, Kirkwood and acting secretary Bell will show that all of the claims, which are now urged in this case, including the allegations of fraud, were thoroughly considered, investigated, discussed, and, in every instance, although three different applications for rehearing were made, decided against Hardin and DeWitt. Surely the language of the Supreme court of the United States in the *U. S.* v. *San Jacinto Tin Co.*: "There must be a time when such allegations "will not be heeded. The examination into alleged "frauds, when the patents are applied for ought to close "all controversy in respect to them, clearly so unless "upon newly discovered evidence of the most convincing "character, Congress should direct proceedings to be in- "stituted to set aside the patents, and that result can be "obtained without impairing the title of innocent parties," is indeed pertinent.

In this case Jordan is an innocent purchaser, having paid large sums of money for these lands relying on the decision of the land department.

It is, therefore, contended that the decision of the land department, that these lands belonged to the United States, is conclusive upon this and all other courts.

III.

We come now to the consideration of the assignments of error, appearing in this record, as a ground for the reversal of this judgment.

The first, second and third assigmnents may be considered together, as embraced in the claim that the court erred in the construction of the Holbrook patent and in the declaration of the rights of plaintiff in error, holding thereunder.

So, also, the fourth and fifth assignments may be treated together.

A. These assignments of error have already been answered in this argnment. If lands embraced in the survey of 1874 were omitted government lands, in the survey of 1835, the meander lines on the south-east 19 and south-east 30 was a line of boundary and the recovery should have been limited to the meander line. If the fact was, as sbustantially found by the court, that at the time of the survey of 1835, there was a large tract of marsh land to the west of the 2.04 acre piece in the south-east of 30, of like character as the piece itself, the judgment as to that piece was manifestly right.

The judgment also with respect to the fractions on the south-east 19 and north-east of 30 was also manifestly right, or, if wrong, the error was committed in favor of plaintiff in error for which it cannot be reversed. The defendant in error is the only one who can be heard to complain.

The judgment as to those last pieces gave plaintiff, in addition to the original fractions, lands under the survey

of 1874 up to the water of Hyde lake at low water mark.

This is all the plaintiff could have recovered had Hyde lake been navigable.

Gould on Waters, Secs. 198 and 203.
Canal Commissioners v. *People*, 5 Wend., 423.
Wheeler v. *Spinola*, 54 N. Y., 377.
Waterman v. *Johnson*, 13 Pick., 261.
West Roxbury v. *Stoddard*, 7 Allen, 158, 167.
Paine v. *Wood*, 108 Mass.
Wood v. *Kelley*, 30 Maine, 47.
Fletcher v. *Phelps*, 28 Vt., 257.
Jakeway v. *Barrett*, 38 Vt., 316.
Mariner v. *Schulte*, 13 Wis., 692.

There is another consideration which ought not to be overlooked in this connection. The declaration would not support a larger judgment than was rendered.

As we have seen, the first count, as settled by the court, only sought a recovery of the original tracts. As to these there never was any contention. The defendant plead that he made no claim to them and never was in possession. (Rec., 41.)

Now what did plaintiff claim by his additional or second count? The first part of the description (ante, page 1) is unknown to either the survey of 1835 or that of 1874. In the first survey lands inside of the meander line are "fractional" tracts, in the second they are lots.

Is this description helped out by the latter part of the count?

In construing the first count, the court held the lan-

guage "with all accretions, alluvions and relictions" to be meaningless. (Rec., 40.)

Did the language used under the videlicet in this count give the description such definiteness that a recovery could or should be had on it? The language is, "all the land "lying between the west boundary line of said south-"east quarter of section 19, and the west line of said "north-east quarter of section thirty, and the middle line "of the permanent water of the lake east of said line, "sometimes designated and known as 'Navigable Lake,' "and sometimes as 'Wolf Lake.'"

How about the north and south boundaries? In what direction does the middle line of the permanent water run, or where is it located? In what state does this line lie, Illinois or Indiana?

Is this such a description that the United States marshal, under a judgment rendered upon this count, could put the plaintiff in possession? Surely the plaintiff cannot be heard to complain of the judgment under this count.

If the judgment was for more lands than the plaintiff was entitled to recover under the pleadings in this case, the defendant alone can assign error for it.

In the interest of the settlement of titles he has not done so.

The remaining language of this count: "all of the lands "lying between the sectional lines of said south-east quar-"ter of section thirty and said lake," if it means anything, must be construed to cover only the belt of marginal lands between the quarter section lines of the south-east quarter of section thirty and the waters of Hyde lake.

The 2.04 acre tract in the south-east corner of this

quarter, as we have seen, was the only tract to which this language could apply. The language is too indefinite to have sustained a judgment for a single foot beyond the meander line of that tract.

As to that tract, the meander line was properly held a boundary as well on this account as for the reason before mentioned.

Referring to the "statement" of this brief verified as we have seen by the findings of the court, it will be remembered that the elevations of this large tract claimed by the plaintiff as riparian to the small 2.04 acre fraction, was all or nearly all, entirely uncovered, or covered with the merest film of water at the time of the original sur-survey in 1834 and 5; that the subsoil was sand and not quagmire or marsh; that it was substantially the same, and as well entitled to be considered land as plaintiff's original 2.04 acre fraction.

Upon these facts none but the extremely imaginative artist of the learned counsel's brief could have pathetically said: "we may imagine with the findings an en-"gagement between parties brave and fair, from the sur-"vey of 1834 to that of 1874, the land making advances "towards the water, and the water meekly holding its "face towards the sun in the day-time; yet at the end of "the wooing, so far as represented, the land is found to "be a sorry suitor, clothed only with reeds and coarse "swamp grass."

It is submitted that the facts in the record fully sustain the judgment of the Circuit court as to this tract, and that upon them the court could not have reached a different judgment.

The language of the court in *Bissell* v. *Fletcher*, 43d

N. W. Rep., 350: "There is no proof whatever that "the land claimed by the plaintiff is an accretion." * * * "In fact all of the proof tends to show that it is not. The "defendant has purchased his land, as a part of the public "domain, from the United States, and it would be rank "injustice to rob him of his property, and give it to the "plaintiff who is already in possession of all of the land "that he purchased and the government sold him," is especially pertinent to this branch of this case.

The land claimed as riparian is as much out of proportion to the original fraction in this case as in that.

B. The fourth assignment of error is on account of the admission in evidence of oral testimony in connection with the map heretofore referred to, and the admission of certain records of the land department.

This assignment is clearly without merit.

The introduction of oral evidence in connection with maps and charts, in investigations of this sort, is a necessary and every-day occurrence.

It is deemed unnecessary to refer to any other cases than those heretofore cited in this argument, to establish the legality and regularity of this practice.

Granger v. *Swart*, 1 Wol., 90.
Lammers v. *Nissen*, 4 Neb., 245.
Glenn v. *Jeffery*, 75 Iowa, 20.
Bissell v, *Fletcher*, 19 Neb., 726.

The plat of the survey made by Alexander Wolcott in 1874, and the government's patents referred to in the fourth assignment are public records and are to be treated of the dignity of such records.

The objection really is that defendant Jordan was im-

properly allowed to read in support of his title, under which he held, the records of the land department showing his deraignment of title from the government.

That was the very contention of the parties, which the court was expected and required to decide upon the evidence adduced upon both sides of the issue. The evidence was clearly admissible.

The fifth assignment of error is general and covered by those heretofore considered.

It is respectfully submitted that the judgment of the Circuit court should be affirmed.

W. C. GOUDY,
For Defendant in Error.